

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

In the Matter of:)
)
)
PROPOSED AMENDMENTS -) Docket Numbers
PACIFIC NORTHWEST) AO-368-A29; DA-01-06
)

The Doubletree Hotel
Seattle Airport
18740 Pacific Highway South
Seattle, Washington 98188

Tuesday,
December 4, 2001

The above-entitled matter came on for
hearing, pursuant to Notice, at 8:30 a.m.

BEFORE: HONORABLE JOHN HUNT
Administrative Judge

APPEARANCES:

On behalf of the Agency:

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BENJAMIN YALE

ALSO PRESENT:

GINO TOSI, Marketing Specialist
William Richmond
Richard Cherry
Randal Stoker
U.S. Department of Agriculture
Washington, D.C. 20250

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>VOIR DIRE</u>
John Mykrantz	6-Cooper	14-Berde 16-Marshall 26-English 30-Yale 31-Berde 33-Beshore	--
William Van Dam	39-Berde	64-Yale 64-English 71-Beshore	--
Daniel McBride	74-Marshall	103-Berde 107-English 111-Cooper 128-Tosi 136-Tosi 137-Beshore 144-Cooper	--
Victor Jensen	146	--	--
Harold Schild	148	--	--
Belinda Silva	150	--	--
Elvin Hollon	156-Beshore	213-Tosi 216-Marshall 218-Tosi 221-Berde	186-Berde 190-Marshall
Gary Jonblonski	225-Beshore	--	--

E X H I B I T S

<u>EXHIBITS:</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
Exhibit Number 1	5	5
Exhibit Number 2	5	5
Exhibit Number 3	5	5
Exhibit Number 4	5	5
Exhibit Number 5	6	38
Exhibit Number 6	39	73
Exhibit Number 7	39	45
Exhibit Number 8	156	208
Exhibit Number 9	156	208
Exhibit Number 10	177	208

1 PROCEEDINGS

2 8:30 a.m.

3 JUDGE HUNT: Are there any objections to
4 those four exhibits that Mr. Cooper identified and
5 marked? Any objection to those being made part of the
6 record?

7 (No response)

8 JUDGE HUNT: Hearing no objections, then
9 Proposed Exhibits 1, 2, 3 and 4 are made a part --
10 entered as exhibits in the record.

11 (The documents referred to
12 were marked for identification
13 as Exhibit Numbers 1, 2, 3 and
14 4 and were received in
15 evidence.)

16 MR. COOPER: In addition, we have an official
17 from the Federal Milk Market Administrator's Office of
18 Order 124 to present statistical data for the use of
19 everybody at the hearing, and I'd like to have him come
20 up and testify now. Mr. Mykrantz.

21 JUDGE HUNT: Good morning, sir.

22 MR. MYKRANTZ: Good morning.

23 Whereupon,

24 JOHN MYKRANTZ

25 having been first duly sworn, was called as a witness

1 herein and was examined and testified as follows:

2 JUDGE HUNT: Fine. Have a seat. Please
3 state and spell your name for the record.

4 THE WITNESS: My name is John Mykrantz. The
5 last name is spelled M-Y-K-R-A-N-T-Z.

6 DIRECT EXAMINATION

7 BY MR. COOPER:

8 Q Mr. Mykrantz, by whom are you employed?

9 A USDA, AMS Dairy Programs, Pacific Northwest,
10 Western and Arizona, Las Vegas Orders.

11 Q In what capacity?

12 A As a marketing specialist.

13 Q Have you brought with you today a document
14 entitled "Compilation of Statistical Material, Federal
15 Milk Marketing Order Number 24" -- "124, Pacific
16 Northwest Marketing Area"?

17 A I have.

18 MR. COOPER: I'd like to have this document
19 marked as Exhibit Number 5, Your Honor.

20 JUDGE HUNT: All right. That's Statistical
21 Data will be marked as Exhibit -- Proposed Exhibit 5.

22 (The document referred to was
23 marked for identification as
24 Exhibit Number 5.)

25

1 BY MR. COOPER:

2 Q There's some material in this document
3 prepared from the official records of the Market
4 Administrator's Office?

5 A Yes, it was.

6 Q By you or under your supervision?

7 A Under my supervision.

8 Q Okay. Are all of the tables in this document
9 regularly published in this form or were some of them
10 created especially for this hearing?

11 A Most of the data is generally published by
12 the Market Administrator's Office through the bulletin
13 website and/or other publications.

14 Q All the tables aren't published in this
15 format, are they?

16 A No, they are not.

17 Q Okay. Could you go through each of these
18 tables, explaining what they are and commenting on any
19 thing that should be of interest to people regarding
20 the table and also indicate which ones are published
21 and which ones were created for this hearing?

22 A Okay. All the data in the compilation is
23 based on records obtained from the Market
24 Administrator's Office and relate to the Pacific
25 Northwest Milk Marketing Order, Federal Order Number

1 124.

2 Most of the data were derived from the
3 monthly handler reports and receipts from utilization
4 and producer payrolls that handlers submit to the
5 Market Administrator on a monthly basis.

6 Some of the data in the tables were compiled
7 using phone numbers and then rounded for inclusion
8 within the tables in abbreviated form. Therefore, in
9 some instances, data may not have due to rounding.

10 The compilation of the statistical material
11 prepared for this hearing consist of 21 pages, plus the
12 front and back cover pages, and a table of contents.
13 There are eight tables and one map in the compilation,
14 and I'll go through these.

15 Table 1, which is on Pages 1 through 5, is a
16 list of handlers, plants, cooperative associations, on
17 the Pacific Northwest Order in December 2000. The list
18 contains the complete names and addresses of handlers
19 and cooperatives or handlers with multiple plants.

20 The complete address of the organization
21 headquarters is listed and individual plants are listed
22 by city, state, pricing zone and plant type. Names and
23 addresses in other portions of the exhibit may appear
24 in abbreviated form.

25 Table 2 on Page 6 is an alphabetical listing

1 of pooled distributing plants, pooled supply plants,
2 partially-regulated distributing plants, and producer-
3 handlers for December 2000. Each is listed by name,
4 state, county and pricing zone. Also listed are
5 cooperative associations acting as handlers.

6 The plants from this table are shown on the
7 map on Page 21 at the end of this compilation, and I'll
8 describe that map later in my testimony.

9 Table 3 on Page 7 shows the pounds and
10 percentage of producer milk by plant and in total for
11 the four classes of utilization in the Pacific
12 Northwest Order for the months of January 2000 through
13 September 2001. Annual totals are shown for 2000 and
14 year-to-date totals are shown for calendar year 2001.

15 The pounds of producer milk in this table are
16 based on pounds reported on handler reports and do not
17 represent totals that have been audited. These pounds
18 of milk and their associated components are used to
19 compute the monthly producer price differential on or
20 before the 14th of each month.

21 Table 4, on Pages 8 and 9, Table 4 on Pages 8
22 and 9, contains the class prices for the Pacific
23 Northwest Order for each month of January 2000 through
24 September 2001. The prices are given for components in
25 the class, the skim milk equivalent value of the

1 components, and the 3.5 percent butterfat, that's 3.5
2 percent butterfat as announced by the Market
3 Administrator.

4 Component prices are on the per-pound basis,
5 skim and 3.5 percent butterfat prices are on the
6 hundredweight basis. The Class 1 price is the price
7 announced for King County, Washington, and includes a
8 Class 1 differential of \$1.90 per hundredweight.
9 Annual and year-to-date averages are given for each
10 column at the end.

11 Table 5 on Page 10 provides prices for
12 producer payments for January 2000 through September
13 2001 and annual and year-to-date averages. Minimum
14 prices to producers under the Order consist of four
15 items. The four items include butterfat protein,
16 butter solids, which are on a per-pound basis, and the
17 producer price differential which is on a per-hundred-
18 weight basis. The statistical uniform price also on a
19 per-hundredweight basis is provided for informational
20 purposes only.

21 Table 6 on Page 11 shows the pounds and
22 percentage of producer milk by state for January 2000
23 through September 2001. These pounds are from payrolls
24 submitted by handlers and subjected to a preliminary
25 audit. These pounds may be somewhat different from the

1 pounds shown in Table 7 on Page 7 -- Table 3 on Page 7
2 which are based on pounds from handler reports and
3 receipts and utilizations.

4 Milk from Nevada and Wyoming was pooled on
5 Federal Order 124 during some months of the period
6 shown and those included in the Utah and Idaho totals
7 for those months, respectively. The data for Nevada
8 and Wyoming are restricted. The second part of Table 6
9 on Page 12 represents the data on Page 11 on a
10 percentage basis.

11 Tables 7 and 8 provide the number of
12 producers and the pounds of produced milk by price,
13 date and county for January 2000 through September
14 2001. Table 7 and 8 show the same information as Table
15 6 but broken down to the county level and, in addition,
16 shows the number of producers. State totals in Table 7
17 and 8 correspond to the state totals in Table 6 on Page
18 11.

19 Table 7 reflects data for 2000 and begins on
20 Page 13 and runs through Page 16. Table 8 reflects the
21 data for 2001 year-to-date and begins on Page 17 and
22 runs through Page 20.

23 Some counties within states are combined to
24 prevent disclosure of restricted data. A number that
25 represents the information of fewer than three

1 producers is restricted. Several footnotes are listed
2 at the end of Table 7 on Page 20 indicating data that
3 is restricted for a number of the counties that are
4 combined with adjoining states' data.

5 Restricted data is identified in the table or
6 in the footnotes and is included in the state totals as
7 noted and in the grand total for each month per the
8 market.

9 The last page of the document is a map of the
10 marketing area. The heavy black line marks the
11 boundary of the marketing area. The counties not
12 shaded are counties from which milk originated and was
13 pooled on the Pacific Northwest Order in December 2000.
14 Also shown on the map is the location of different
15 types of regulated plants. These plants are identified
16 by symbols as shown in the box in the lower right-hand
17 corner of the map.

18 For example, in King County, Washington, you
19 can see that there are three symbols of black dots
20 within circles. Each black dot within a circle
21 indicates the approximate location of one pooled
22 distributing plant. Two of the four partially-
23 regulated distributing plants are not shown on the map.

24 They are located in Los Angeles County, California,
25 and are included in the map that's on Page 6.

1 Q And as you indicated, all the material in
2 this compilation is from the official records of the
3 Market Administrator's Office, is that correct?

4 A Yes, it is.

5 Q And is it being presented in support or in
6 opposition to any particular proposal or for
7 informational purposes only?

8 A Not in support of any proposal, just for
9 informational purposes only.

10 Q Okay. And let me ask you one other question,
11 Mr. Mykrantz. Could you please explain to us what the
12 term "producer price differential" means?

13 A The producer price differential is a price
14 announced by the Market Administrator each month. The
15 Market Administrator announces a producer price
16 differential on or before the 14th. The calculation of
17 the producer price differential is based on information
18 submitted by handlers of their receipts and
19 utilizations.

20 Reports are received from each pooled plant
21 and cooperative that pools milk on the Order. In the
22 process of computing the producer price differential,
23 we add the milk pooled on the Order and determine the
24 utilization class of the milk.

25 The pool record represents the value of the

1 four classes of utilization. The producer price
2 differential represents each producer's share of the
3 pool above or below the Class 3 value. When you see a
4 50-cent producer price differential, that's roughly the
5 weighted average value of the Class 1, 2 and 4 milk in
6 the market above the Class 3 value.

7 All producers who are pooled on the Order
8 share in the producer price differential through the
9 handlers to whom they deliver milk. The producer price
10 differential is subject to location adjustments as
11 defined in the Order.

12 Q Thank you very much, Mr. Mykrantz.

13 MR. COOPER: Offer him over for cross
14 examination at this time, Your Honor.

15 JUDGE HUNT: Is there any questions of Mr.
16 Mykrantz?

17 MR. BERDE: Yes.

18 JUDGE HUNT: I'm sorry.

19 MR. BERDE: I have questions but not on the
20 admissibility.

21 JUDGE HUNT: All right.

22 CROSS EXAMINATION

23 BY MR. BERDE:

24 Q Good morning, Mr. Mykrantz.

25 JUDGE HUNT: Would you identify yourself when

1 you ask questions of the witness?

2 MR. BERDE: Sidney Berde.

3 BY MR. BERDE:

4 Q Turning to Table 7, for the year 2000, and
5 directing your attention to the period January through
6 June, I note that there was no milk delivered pooled in
7 the Order originating with Southern Idaho, is that
8 correct?

9 A That's true.

10 Q And the same is true with respect to Utah, is
11 that correct?

12 A That's correct.

13 Q And then, following that period, commencing
14 in July, there was a change, was there not?

15 A Yes, there was.

16 Q And would you indicate what that change is?

17 A Beginning in July, milk from Southern Idaho
18 and -- started to be pooled on the Order.

19 Q And that milk was pooled simply by complying
20 with the pool requirements of the Order, was it not?

21 A Correct.

22 Q And then diverted back to the origin in
23 Southern Idaho from which the milk originated?

24 A I believe that's proprietary information that
25 we cannot release.

1 Q And -- and the same -- would you give me the
2 same answer with respect to Utah?

3 A Correct.

4 Q Yeah. So, this does not indicate whether
5 that milk was all diverted or not diverted, is that
6 correct?

7 A No, it does not.

8 Q Yeah. Okay. Al that milk originated from an
9 area outside of the marketing area, did it not?

10 A Yes, it did.

11 Q Thank you.

12 MR. BERDE: That's all I have.

13 MR. MARSHALL: Your Honor, Doug Marshall from
14 Northwest Dairy Association.

15 CROSS EXAMINATION

16 BY MR. MARSHALL:

17 Q Kind of following along the lines of the last
18 series of questions, John, let me ask, does the Market
19 Administrator publish on the Internet data pertaining
20 to production and utilization within the Pacific
21 Northwest Order?

22 A As far as class utilizations?

23 Q Pounds utilized by -- pounds of milk utilized
24 by class of utilization, yes.

25 A Yes, they do.

1 Q And would some of that data precede the year
2 2000 which is shown? I note that this exhibit only
3 shows data for 2000 and 2001. Would some of the data
4 on the Internet go back further to 1999?

5 A I believe it goes back to 1996 in the form of
6 compilations of statistical material.

7 MR. MARSHALL: Your Honor, for purposes of
8 briefing, at some point, I'm sure we and others will
9 want official notice to be taken of data sources that
10 will allow us to use, if we wish, in briefing data
11 histories and data that will develop after the hearing,
12 and so I'd ask that official notice be taken of all
13 statistical material that is now published or may in
14 the future be published by the Local Market
15 Administrator's Office on their website.

16 JUDGE HUNT: Material not published?

17 MR. MARSHALL: Published to date or that may
18 be published in the future for the deadlines for
19 briefing and/or for comments.

20 JUDGE HUNT: That's all accessible --
21 accessible to the public, all the information you're
22 referring to?

23 MR. MARSHALL: Yes, Your Honor. It's
24 accessible on the website of the computer.

25 JUDGE HUNT: On the website. In effect,

1 you're asking for official notice of the website, the
2 information on the AMS website?

3 MR. MARSHALL: No, Your Honor. There's
4 actually a separate website for the Local Market
5 Administrator's Office in the three Western Orders, --

6 JUDGE HUNT: Oh, I see.

7 MR. MARSHALL: -- and Mr. Mykrantz, I
8 believe, --

9 JUDGE HUNT: Do you know the website address?
10 Do you know the website address?

11 BY MR. MARSHALL:

12 Q Mr. Mykrantz, do you know the website
13 address?

14 A It's on the website of our offices, on the
15 front of the compilation of statistical material that
16 we prepared for this hearing in modified form. It's
17 the normal www.http --

18 JUDGE HUNT: What is that?

19 THE WITNESS: http and then fmaseattle.com.

20 JUDGE HUNT: And that's the website -- any
21 information on that website that is available now or in
22 the future, you'd like to have official notice taken of
23 that?

24 MR. MARSHALL: Yes, Your Honor, so that we
25 may use it for briefing and/or for comments.

1 JUDGE HUNT: Is there any objection to taking
2 official notice of the website, Mr. Cooper?

3 MR. COOPER: Okay. At the present time, the
4 same Market Administrator's Office is administering
5 several different marketing orders. So, are we
6 confining to the Order 124 data or what are we looking
7 for here, Doug?

8 MR. MARSHALL: Your Honor, I was not seeking
9 to confine it just to Order 124 for the reason that
10 Order 133, which is also administered by this Order --
11 Administrator -- Markets -- this Order's Market
12 Administrator, also contains data that may be useful in
13 showing the shift of utilization from one federal order
14 to the other that occurred in the year -- beginning in
15 the year 2000 that is the subject of this hearing.

16 MR. COOPER: Well, first of all, there is no
17 133. I don't know. You mean 131 or 135?

18 MR. MARSHALL: I'm sorry. I believe 135. I
19 misspoke.

20 MR. COOPER: Okay. And for example, 131
21 data, I'm not sure they have anything on their website
22 prior to -- maybe they do. I -- I really don't know.
23 I mean, that was an administered separately.

24 MR. MARSHALL: We have no interest in Order
25 131, only the Western Order 135 and Pacific Northwest

1 124.

2 MR. COOPER: Is that data on the website, Mr.
3 Mykrantz?

4 THE WITNESS: Yes, it is.

5 MR. COOPER: Before 2000? Before January
6 2000, when the Orders were combined?

7 THE WITNESS: The data on the website
8 represents the Orders that existed -- as they existed
9 prior to 2000.

10 MR. COOPER: I have no objection. I just
11 wanted to clarify that.

12 JUDGE HUNT: Does anyone else have any
13 objections to taking official notice of the website
14 that's referred to?

15 (No response)

16 JUDGE HUNT: Okay. I'm sorry. Mr. Beshore?

17 MR. BESHORE: have no objection. There is
18 some useful --

19 JUDGE HUNT: If you'd identify yourself?

20 MR. BESHORE: Oh, Marvin Beshore. I have no
21 objection. There's some useful historical information
22 there, but just for clarification, with respect to data
23 that's not presently there, and I understood the -- the
24 request to include data that's not presently on the
25 website, I think we just need to be very precise about

1 what we are or are not including in the -- in the
2 record as of what date with respect to that kind of
3 information.

4 I mean, we all know what's there now or have
5 the ability to know what's there now during the course
6 of the hearing, but as to post-hearing postings, I just
7 have a concern that we ought to have some precision
8 with respect to what -- what we might be including
9 within this -- this request.

10 JUDGE HUNT: Do you have a proposal on -- on
11 the --

12 MR. BESHORE: No, I'm not sure I do. But I
13 don't think it should be absolutely open-ended. I
14 mean, if there are -- for instance, the -- the typical
15 monthly publications which are posted, I don't think
16 anybody has any problem with that, but I think there
17 could possibly be a -- you know, a problem or
18 legitimate questions raised if -- if a newly- -- a new
19 type of information not previously published appeared,
20 you know, on the website in the context of this
21 proceeding while it was pending. That's my concern.

22 JUDGE HUNT: Any other comments? Mr. Cooper?

23 MR. COOPER: I would join, I think, with Mr.
24 Beshore in that perhaps we could cut it off with the
25 types of information currently published as updated

1 until the time of briefing.

2 MR. MARSHALL: No objection, Your Honor.

3 JUDGE HUNT: Okay. So take official notice
4 until date for briefing. Is that the -- what you
5 proposed?

6 MR. MARSHALL: Your Honor, we proposed
7 through the dates of briefing or any comments on
8 recommended decision.

9 JUDGE HUNT: To the comment period?

10 MR. COOPER: Well, again the record has to be
11 closed at some point, and we can't keep it open for
12 comment period because then we'd be adding new evidence
13 to the record.

14 MR. MARSHALL: This is an interesting
15 argument, Your Honor. Many of us here participated in
16 the hearing a year and a half ago over which you
17 presided, and much of the data source that's available
18 on the history pertaining to that particular proceeding
19 was only several months old at the time, and we now
20 have about four times as much data available on the
21 Internet today than we would have had at the time of
22 the hearing, and I'd just assume that at some point in
23 its internal review of proposals and comments in an on-
24 going proceeding, the Department does look at those
25 kinds of realities, and I think the industry ought to

1 be allowed to comment on them.

2 JUDGE HUNT: Any further comment on that? I
3 understand there's no objections to taking official
4 notice. It's a matter of when to cut it off, either at
5 the briefing period or at the end of the comment
6 period. Is that -- is that the issue?

7 MR. COOPER: Yeah. I mean, normally, it's
8 based upon the information before the Secretary when he
9 makes his decision, when he makes his recommended
10 decision or his -- if it's an emergency, you know, some
11 interim final or final decision or something like that.

12 That would be a cut-off point because for purposes of
13 judicial review, the record has to be closed at some
14 point. It can't go on forever.

15 MR. YALE: If I might make a comment, Your
16 Honor?

17 JUDGE HUNT: Yes, Mr. Yale.

18 MR. YALE: It's hard for me to --

19 JUDGE HUNT: Identify yourself for the
20 record.

21 MR. YALE: I --

22 JUDGE HUNT: Mr. Yale, identify yourself.

23 MR. YALE: Yeah. Benjamin Yale. You know,
24 we have formal rulemaking, and I think the minute that
25 you allow any evidence that -- that -- that is

1 available after the opportunity for testifying and
2 cross examination and consideration under those issues,
3 I think it puts us at risk of going beyond formal
4 rulemaking.

5 The information's available now. It's got to
6 be based upon what's in the record, and, you know, as
7 much as I -- I share Mr. Marshall's concern and the
8 availability of that information, and it might be
9 relevant down the road, I think everything we need for
10 this hearing is now available and/or is available on
11 the Internet, and if it's anything that occurs after
12 today and hopefully not after tomorrow, we don't have
13 to worry about tomorrow, if we're going to be done
14 today, the -- should -- I think it needs to be shut
15 off. Otherwise, the whole opportunity to formal
16 rulemaking, to be able to examine and cross examine and
17 make it part of the record is -- is lost and that's a
18 very important part of the federal order rulemaking
19 process.

20 JUDGE HUNT: So, you propose that we shut off
21 as of the end of the hearing?

22 MR. YALE: That's right. Yes.

23 JUDGE HUNT: Mr. Berde?

24 MR. BERDE: Just a short comment. I don't
25 want to extend this. Official notice may be taken of

1 any facts that are not in controversy by definition.
2 The Secretary is going to pay attention to any such
3 facts that are submitted by any person on his -- in his
4 comments.

5 We're asking as a part of the Notice of
6 Hearing the omission of a recommended decision. So, I
7 don't think there's going to be any problem. The only
8 -- the only problem I can conceive of is that some
9 party's unaware of what any other party's going to ask
10 official notice to be taken of.

11 I -- I can't envisage that that's going to be
12 a big problem. So, any facts that are subject to
13 official notice, I believe any one is going to submit
14 comments, can use. So, I -- I don't know what the
15 argument's about or whether there's really any
16 controversy about what Mr. -- what Mr. Marshall's
17 asking.

18 JUDGE HUNT: The information on the website,
19 that's compiled by the Government, AMS?

20 THE WITNESS: Correct.

21 JUDGE HUNT: Any other comments before I
22 rule?

23 (No response)

24 JUDGE HUNT: I will take official notice --
25 official notice will be taken of the website and take

1 official notice of information to the close of the
2 comment period.

3 Any other questions? Yes, sir?

4 MR. ENGLISH: Charles English.

5 CROSS EXAMINATION

6 BY MR. ENGLISH:

7 Q Mr. Mykrantz, turning to Tables 6 and 7, I
8 guess Table 7 might show this the best, and looking at
9 Page 14, under Washington and the County of Whatcom, in
10 -- in January through April of 2000, there's a fairly
11 consistent number of dairy farmers and a fairly
12 consistent pounds of milk pooled on the Order, correct,
13 in terms of comparing those -- you range from only 224
14 to 226 producers and a pounds pooled from a 111 million
15 to, say, a 121 million. It's a fairly narrow range for
16 those four months, correct?

17 A Correct.

18 Q But when you get to May, you drop to 26
19 producers and 11 million pounds, --

20 A Correct.

21 Q -- and then if you continue on on Page 16, by
22 the time you get back to July, you're back to 223
23 million and a 121 million pounds.

24 To the extent that that occurs, I take it
25 that that is not because suddenly 200 dairy farmers

1 stopped producing milk and then came back and started
2 producing milk two months later, correct?

3 A You're correct.

4 Q Okay. What -- what in your opinion, and to
5 the extent you can tell us, happens in circumstances
6 like that, when you see that kind of drop in pooling?

7 A Handlers have the ability to pool and not
8 pool producers, certain types of handlers have that
9 ability to pool and not to pool producers, according to
10 the Order language.

11 Q And what kind of handlers are that who have
12 that ability, generally?

13 A Generally, cooperatives.

14 Q And is it basically that economic
15 circumstances for that particular month on the various
16 prices for classes of milk might send a signal to those
17 cooperatives as to whether or not to pool all of their
18 milk for that month?

19 A Generally, what we have noticed was that if a
20 class price was above the blend price, that type of
21 milk, wherever possible, was not pooled.

22 Q And so, for instance, for clarity purposes,
23 if the Class 3 price is above the blend price, some
24 Class 3 milk may not be pooled for that financial
25 reason, correct?

1 A It would be in the financial interest of the
2 handler to do that.

3 Q And similarly, if Class 4 were above the
4 blend, it would be in the financial interests of the
5 handler with Class 4 milk, to the extent they could,
6 not to pool some of that milk, correct?

7 A Correct.

8 Q So, when the Secretary is looking at Table 6
9 and 7 and sees a variation from month to month, but
10 then the number returns, it would be a fair presumption
11 to make that that's not milk that's disappearing
12 entirely, it's milk that's simply not being pooled for
13 economic reasons, correct?

14 A It's milk that has not been pooled.

15 Q All right.

16 A In most --

17 Q Do you do that calculation on -- on the basis
18 of eligible milk not pooled? Is that -- is that a
19 number you keep in your office?

20 A We do.

21 Q Is that a number you publish regularly?

22 A No, it is not.

23 Q Okay. Is that for confidentiality reasons?

24 A Many times, it's restricted.

25 Q Just one other series of questions. I think

1 you know there's been sort of a series of these
2 hearings. This is the fourth in a series of hearings,
3 and at least in two other hearings, an issue has arisen
4 concerning California milk being pooled on the Upper
5 Midwest Order, Central Orders.

6 Certainly note that Table 6 would not
7 indicate an increase of any kind in -- in California
8 milk being pooled in the Pacific Northwest, correct?

9 A The amount of milk from California pooled on
10 the Order has not changed significantly over the past
11 several years.

12 Q To your knowledge, and from testimony at a
13 prior hearing, would it be -- would it be fair to say
14 that that milk from California that is being pooled on
15 the Pacific Northwest Order has been historically
16 associated with this Order for a number of years?

17 A Correct.

18 Q And indeed, it's only coming from the two
19 northern counties of California, correct?

20 A Correct.

21 MR. ENGLISH: Okay. Thank you. That's all I
22 have.

23 JUDGE HUNT: Yes?

24 MR. YALE: Ben Yale.

25

1 CROSS EXAMINATION

2 BY MR. YALE:

3 Q Good morning.

4 A Good morning.

5 Q A couple follow-up questions. In your
6 tables, you do not identify non-pooled plants that
7 receive pooled milk, do you?

8 A No, we do not.

9 Q Is that information available?

10 A There is a publication that's put out on an
11 annual basis which lists plant handlers and other
12 plants associated with the Pacific Northwest Order.
13 It's published on our website.

14 Q Is that information available on a monthly
15 basis?

16 A I guess, yes, it would be available on a
17 monthly basis, but it's not typically published, except
18 for once a year.

19 Q Is it readily available? I mean, could we
20 have it for this hearing, a list of the plants by each
21 month that were associated with the Order?

22 A I don't think it would be possible to compile
23 that list today.

24 Q Mr. Berde pointed out that there's a period
25 in July and September where milk in Utah and Idaho,

1 portions of Idaho suddenly became pooled under the
2 Order. Do you recall those questions?

3 A Yes.

4 Q Were there any new plants, distributing
5 plants that became pooled on this Order out of those
6 areas?

7 A There were no new distributing plants between
8 June and August of 2000, of 2000.

9 MR. YALE: I have nothing else. Thank you.

10 JUDGE HUNT: Yes, sir?

11 CROSS EXAMINATION

12 BY MR. BERDE:

13 Q Following up on Mr. English's question,
14 Sidney Berde again, is there some provision in the
15 Order that would preclude what has been referred to as
16 "the double dipping phenomena" that was the subject of
17 the hearing in the Upper Midwest and the Central Order
18 and Middle Atlantic?

19 A I don't believe there's any specific Order
20 language in the Pacific Northwest Order that states
21 that.

22 Q Would the dairy farmer for other markets
23 provision have any disincentive to the pooling of milk
24 that is already subject to the quota system in
25 California?

1 A I don't think it addresses the concept of
2 double dipping.

3 Q What -- what is your understanding of what
4 the dairy farmer for other markets provision does?

5 A The dairy farmer for other markets provision
6 prevents a producer from being only partially pooled on
7 the Order only 15 days of the month, for example,
8 whereas the other 15 days of production was not pooled.

9 Q Does that provision operate to impede or
10 discourage the marketing of California producers over a
11 quart of milk in your Order?

12 A I don't think it deals with any regulation
13 that a dairy farmer's milk may be subject to other than
14 the Federal Order.

15 Q Are you familiar with the final decision that
16 was rendered prior to the implementation of the Reform
17 Amendments in which there is language which states that
18 the Pacific Northwest Order contains a dairy farmer for
19 other markets provision to prevent California producers
20 to pool volume of milk equal to 400 pounds in
21 California and then attempt to share in the Pacific
22 Northwest Class 1 Market?

23 A I don't recall that specifically, but --

24 Q Would you agree with that description of the
25 purpose of the dairy farmer for other markets

1 provision?

2 A I guess I can't speak to a recommended
3 decision.

4 Q Well, that was -- that was a final decision
5 --

6 A I'm aware of the final decision.

7 Q -- that preceded the implementation of the
8 Reform Amendments.

9 But the facts are that the California milk
10 that is pooled in the Pacific Northwest has been
11 historically pooled and constitutes a historic source
12 of milk for the Order, isn't that correct?

13 A Correct.

14 Q Okay.

15 JUDGE HUNT: Any other questions? Mr.
16 Beshore?

17 CROSS EXAMINATION

18 BY MR. BESHORE:

19 Q Mr. Mykrantz, I think Mr. Yale asked you
20 about the publication, the annual publication of plants
21 which includes a listing of -- of non-pooled plants.
22 That's on the website, is it not, as of January 1,
23 2001?

24 A It is on the website, the most recent
25 publication.

1 Q Okay. The listing of non-pooled plants,
2 which I've got a print-out of the website, the listing
3 of other non-pooled plants, which is Category Number 8
4 on that -- on that plant list, can you just tell us
5 what that notice indicates?

6 A Those plants on the list are in some way
7 connected with either producer milk or with pooled
8 plants under the Order, whether they received milk from
9 pooled plants or they received producer milk diverted
10 from pooled plants.

11 Q So, every -- every plant on that -- on that
12 list would have either, including the plants in
13 Montana, a number of plants in Idaho, Utah, etc., would
14 -- would have received producer milk that was pooled on
15 Order 124 some time during the year?

16 A They may have received package product from a
17 pooled distributing plant pooled on the Pacific
18 Northwest Order or diverted producer milk.

19 Q Okay. So, if -- if bulk milk was transferred
20 from an Order 124 pooled plant to a non-pooled plant,
21 that would be -- that non-pooled plant would then show
22 up --

23 A Correct.

24 Q -- on that list? And are you also saying
25 that if packaged milk was transferred from a pooled

1 plant to a plant that's not fully regulated, that it
2 would be listed as -- as a non-pooled plant?

3 A Correct.

4 Q Okay. Can you -- there are two listings of
5 -- of non-pooled plants. One, Number 5, which other
6 Order plants distribute and transfer fluid milk
7 products into the marketing area, and eight other non-
8 pooled plants. Can you just tell us the difference of
9 -- between those two sets of lists?

10 A What was the description of the first
11 category, 5?

12 Q Non-pooled plants. Other Order plants -- I
13 guess it's -- maybe it's subsequent or -- listen to
14 myself read it. "Other Order plants distributing or
15 transferring fluid milk products into the marketing
16 area." They'd have to be plants regulated under other
17 federal Orders?

18 A Correct.

19 Q Okay. That's Category 5. So then, Category
20 8, which lists other non-pooled plants under Section
21 1124.8, it's your testimony that that would include
22 distributing plants that received transfers of packaged
23 milk products from Order 124 plants?

24 A Bulk milk and/or cream.

25 Q Bulk milk, cream, --

1 A Packaged products.

2 Q -- and it would also include non-pooled
3 plants, like cheese plants at Twin Falls, Idaho, for
4 instance, which received producer milk from diverted --

5 A You might assume that.

6 Q There are a number of California plants on --
7 on this list. Are there regular movements of milk --
8 milk or -- milk products from this -- this Order to
9 plants in California?

10 A Yes, there are.

11 Q Are they generally packaged products or bulk
12 milk? Can you tell us?

13 A I think the vast majority is bulk.

14 Q Is that the California pooled milk that Mr.
15 English was asking you about or Mr. Yale?

16 A Not necessarily.

17 Q Are you familiar with the term "split plant"?

18 A Yes, I am.

19 Q Does Order 124 provide for split plants?

20 A I don't believe it does.

21 Q Do you know whether any of the -- whether the
22 -- the proposals in the Hearing Notice would -- would
23 change that in any way?

24 A I don't believe that it would.

25 MR. BESHORE: Thank you.

1 JUDGE HUNT: Any other -- yes, sir?

2 MR. ENGLISH: Charles English, again.

3 CROSS EXAMINATION

4 BY MR. ENGLISH:

5 Q Just following up on some of the questions
6 from Mr. Beshore. To the extent Table 3 lists pounds
7 percentage of producer milk by class, that would not
8 include milk that is sold by producer handlers,
9 correct?

10 A No, it does not.

11 Q And this Order is one of a couple Orders that
12 actually has a significant number, significant being a
13 relative term, but it has more than half of the
14 producer handlers, correct?

15 A It's my understanding that we generally have
16 more than other Orders.

17 Q Do you know the approximate percentage of
18 Class 1 sales in this market that would be represented
19 by producer handlers if they were included?

20 A I think it's roughly about 10 percent.

21 Q Thank you.

22 JUDGE HUNT: Anything further?

23 (No response)

24 JUDGE HUNT: All right. Thank you very much.

25 (Whereupon, the witness was excused.)

1 MR. COOPER: I ask that Exhibit 5 be
2 received, Your Honor.

3 JUDGE HUNT: Any objections to Exhibit 5
4 being made part of the record?

5 (No response)

6 JUDGE HUNT: Hearing no objections, Exhibit 5
7 is received in evidence and made part of the record.

8 (The document referred to,
9 having been previously marked
10 for identification as Exhibit
11 Number 5, was received in
12 evidence.)

13 MR. COOPER: The Government has no further
14 witnesses. So, it's time for the Proponents.

15 JUDGE HUNT: All right. Mr. Berde, you want
16 to start off?

17 MR. BERDE: I call Mr. Van Dam as a witness.
18 I also at this point, I'd like to have marked as
19 Exhibit 1 -- I'm sorry -- as Exhibit 6, a document that
20 lists the Requests for Official Notice, and as Exhibit
21 7, a single-page document that is headed "Pounds of
22 Milk Pooled on the Pacific Northwest Milk Order Number
23 124 from Out-of-Area by State, by Month, and Impact on
24 Blend". Exhibit 7.

25

1 (The documents referred to
2 were marked for identification
3 as Exhibit Numbers 6 and 7.)

4 JUDGE HUNT: Good morning, Mr. Van Dam.

5 MR. VAN DAM: Good morning.

6 Whereupon,

7 WILLIAM VAN DAM

8 having been first duly sworn, was called as a witness
9 herein and was examined and testified as follows:

10 JUDGE HUNT: State and spell your name,
11 please.

12 THE WITNESS: My name is William C. Van Dam,
13 V-A-N D-A-M. That's two words.

14 DIRECT EXAMINATION

15 BY MR. BERDE:

16 Q Mr. Van Dam, --

17 MR. COOPER: Your Honor, before he gets
18 started on this, would you pass out Exhibit 6 to me?

19 MR. BERDE: Oh, sure. I'm sorry.

20 MR. COOPER: 7, I think, is attached to the
21 statement, is that right?

22 MR. BERDE: No.

23 MR. COOPER: But it is -- it is attached to -
24 -

25 MR. BERDE: It is attached, yes.

1 MR. COOPER: Yes.

2 THE WITNESS: Exhibit 7 is attached to the
3 end of the testimony that I handed out.

4 MR. COOPER: 6 and 7.

5 THE WITNESS: Did you hand out 6?

6 MR. BERDE: Yeah.

7 THE WITNESS: No. 6 is the other one. There
8 you go.

9 MR. BERDE: Thank you, Mr. English.

10 MR. COOPER: Your Honor, so they can hear in
11 the back, I don't know if it's the volume on these
12 things or people have to speak up or what the deal is.

13 MR. BERDE: I'll try to raise my voice. Do
14 you hear me better now?

15 JUDGE HUNT: All right. Okay. Good. Mr.
16 Berde?

17 BY MR. BERDE:

18 Q Mr. Van Dam, before you present your
19 testimony, are there certain corrections that you want
20 to make in the Notice of Hearing as published?

21 A There certainly are. There are a couple of
22 omissions that we would like to get included in the
23 testimony.

24 Q And does the first one appear in the section,
25 in the Proposal Number 1, under Section 1124.7E?

1 A It does.

2 Q And is it correct that the correction appears
3 at the bottom of the printed Notice in the last line
4 that begins "Association" or "wholly-owned
5 subsidiaries"? Is that where there is a correction to
6 be inserted?

7 A Immediately after that, yes.

8 Q And is the language of the insertion the
9 following, "and from plants of the cooperative or its
10 wholly-owned subsidiaries"?

11 A That's correct.

12 Q And then, as published, the language follows
13 that "for which pooled plant", etc., --

14 A Yes.

15 Q -- is that correct?

16 A That's correct.

17 Q And is there another correction that you want
18 to make that appears under that same section,
19 Subparagraph F?

20 A That's correct.

21 Q In the second line that begins "operated by
22 one or more", --

23 A Correct.

24 Q -- at that point, you want to insert the word
25 "cooperative --

1 A Correct, again.

2 Q -- handlers", etc., is that correct?

3 A That's correct. Single word. Just add
4 cooperative.

5 Q And then, dropping down to F(1), --

6 A Correct.

7 Q -- that the insertion there should be "the
8 cooperative handlers"?

9 A Again, single word, cooperative. That's
10 correct.

11 Q And then, under F(2), --

12 A Correct.

13 Q -- in the second line, should the word
14 "cooperative" be inserted before the word "handler"?

15 A The end of that line. Yes, that's correct,
16 and that is -- that's all the adjustments we want to
17 make.

18 Q Mr. Van Dam, would you briefly describe for
19 the record your background training and experience?

20 A Certainly. I was born and raised on a dairy
21 farm in Southern California, which makes me pretty
22 unpopular in this crowd here, and for schooling, I went
23 to University of California at Davis, where I received
24 my B.S. degree in Agricultural Economics way back in
25 1965.

1 I then spent a few years in the U.S. Army,
2 came back and went to Cornell University, where I got
3 my Master's degree in Agricultural Economics in 1969.
4 From then, I went back to California and managed an
5 association of producers in California, in Sacramento,
6 for a few years. From there, I moved over to what was
7 Federal Cooperative Creamery, became California
8 Cooperative Creamery, was there for a number of years.
9 From there, became a part-owner of a distribution
10 business in Petaluma, California, still exists to this
11 date, Clover Sterner Farms.

12 From there, I moved to Washington -- well, I
13 went to DCCA for awhile in Del Rey, California, where I
14 was manager of marketing, director of marketing was my
15 title at DCCA for a stretch, moved to Washington and
16 went to work at Dairy Marketing Services for a short
17 stretch and then went to Simplet Company, was
18 transferred to Idaho, to the Boise area, where I became
19 manager of the Swiss Village Cheese Plant. From there,
20 I became a consultant, as many of us do when the
21 positions run out, and from there became -- was hired
22 four years ago this month, four years ago this month,
23 to become the CEO of Northwest Milk Marketing
24 Federation.

25 Q And in preparation for this hearing, did you

1 prepare a table which has been identified as "Pounds of
2 Milk Pooled on the Pacific Northwest Order Number 124
3 from Out-of-Area by State, By Month, and Impact on
4 Blend"?

5 A Yes, I did.

6 Q And would you describe the source of the data
7 that appears on that table, which is listed as
8 "Diverted Pounds", etc., etc.?

9 A Okay. These -- the primary data on there,
10 the pounds of milk that was diverted, came from Table 7
11 and Table 8 that was presented by the Department,
12 extracted from that table specifically the Idaho milk
13 is the Southern Idaho Line in those tables, and the
14 Utah pounds came from the Utah Line on those tables. I
15 did the compilation, put the totals together.

16 Q And did you compute the PPD?

17 A The PPD was extracted from the reports put
18 out by the Market Administrator's Office.

19 Q And then, from that, you computed the dollar
20 value of the impact of that diverted milk?

21 A Yes, I did.

22 Q And the estimated reduction in the Pacific
23 Northwest Order Blend?

24 A Yes, I did.

25 MR. BERDE: Your Honor, we offer Exhibit 7.

1 JUDGE HUNT: Any objections to Mr. Berde's
2 Exhibit 7 being made part of the record?

3 (No response)

4 JUDGE HUNT: Hearing no objections, Exhibit 7
5 is admitted into evidence.

6 (The document referred to,
7 having been previously marked
8 for identification as Exhibit
9 Number 7, was received in
10 evidence.)

11 BY MR. BERDE:

12 Q You have a prepared statement, do you not?

13 A Yes, I do.

14 MR. BERDE: I believe there's enough copies
15 for everybody. If you haven't found one, I believe
16 they're chasing around somewhere.

17 THE WITNESS: "This hearing has been called
18 at the Request of Northwest Milk Marketing Federation,
19 NMMF, to amend certain provisions of the Pacific
20 Northwest Order, NO, that's described in Proposals 1
21 and 2 in the Notice of Hearing.

22 NMMF is a federation of four marketing --
23 four dairy marketing cooperatives and 48 independent
24 producers who have joined together to engage in the
25 collective marketing of milk in the -- marketing of

1 milk to regulated handlers as authorized by the Kemper-
2 Olmstead Act.

3 The cooperative members of NMMF include
4 Northwest Dairy Association, Tillamuck County Creamery
5 Association, Farmer Cooperative Creamery, and Northwest
6 Independent Milk Producers.

7 In addition to NMMF -- in addition, NMMF has
8 a separate pricing agreement with all but one of the
9 producers who are members of DFA and with one other
10 independent producer who is not a member of NMMF.

11 Collectively, NMMF and its associated
12 producers in February 2001, the last month in which
13 NMMF priced milk, represented 98 percent of the
14 producers who historically have supplied milk to the
15 P&O Marketing Area and which account for 97.5 percent
16 of the milk pooled under the Order.

17 NMMF was organized for the purpose of
18 establishing a cooperative marketing structure to
19 enhance the returns to its associated producers who
20 constitute the historic source of supply of milk to
21 handlers located in the P&O."

22 BY MR. BERDE:

23 Q Is it regulated by the P&O?

24 A Yeah. Regulated by the P&O. That is
25 correct.

1 "Need for Mandatory Action. Proposals 1 and
2 2 are designed to correct what appear to be unintended
3 consequences of the basic changes wrought by the
4 Federal Order Reform in the manner in which the
5 producer location value of the milk is determined. The
6 AMAA authorizes the Secretary to adjust the uniform
7 prices for all milk delivered by producers in each
8 Federal Order to reflect the locations at which the
9 delivery of such milk is made.

10 Prior to reform, adjustments to the producer
11 blend price was based upon distance from the basing
12 point specified in the Order acted as an effective
13 means of defining the producers who constitute the
14 reliable source of milk for each marketing area's
15 handlers.

16 The January 1, 2000, Reform Amendments
17 brought a fundamental change to the Federal Order
18 Pricing System. Utilizing a computer-generated model
19 of the nation's dairy industry, the reform decision
20 determined what it described as the spacial value of
21 milk at several hundred local supply and demand
22 locations across the country.

23 Based on the model, Federal Order Class 1
24 Differentials were established for milk delivered to
25 plants in every county in the nation to reflect the

1 county's supply and demand value of milk rather than
2 distance from an Order's basing point. The same Class
3 1 location value system is also used to adjust pooled
4 draws on all milk, regardless of use.

5 Under the new system, milk diverted from
6 plants in the marketing area and delivered hundreds of
7 miles distant can now be valued at the same price as
8 milk at the plant from which the milk was diverted.
9 Distance is only adjusted by differences in Class 1
10 differentials applied based on where the milk was
11 actually delivered.

12 Using a somewhat unlikely example, we can
13 illustrate the lack of economic consistency in this new
14 system. Assuming a producer located in Ithaca, New
15 York, the home of the pricing model we'll be referring
16 to, is paper pooled in a P&O but has his milk
17 delivered, call it diverted -- called "diverted" in the
18 Federal Order language, to a local cheese plant in
19 Tompkins County, New York, area, this producer, because
20 he is hypothetically pooled in the P&O, will get the
21 blend price of the P&O, plus 60 cents, which is the
22 difference between the Class 1 differential in the P&O,
23 a \$1.90, and in Tompkins County, \$2.50.

24 Not only did the P&O producers have the Class
25 1 usage added to their pool," --

1 Q You mean the Class 3?

2 A Class 3, yes. "Not only did the P&O
3 producers have the Class 3 usage added to their pool,
4 they also had the honor of paying out a share of the
5 P&O's PPD, producer price differential, and the
6 exceptional honor of paying an additional 60 cents per
7 hundredweight.

8 It is exactly this kind of arrangement that
9 has allowed millions of dollars to be transferred from
10 the P&O to producers located in Southern Idaho and
11 Utah. This outcome is difficult to explain and even
12 more difficult to justify.

13 Though the Secretary specifically considered
14 and rejected open pooling during the rulemaking process
15 that culminated in the Reform Amendments, elimination
16 of the pre-reform producer location adjustment, coupled
17 with loose or no touch-base diversion provisions, has
18 nonetheless permitted the pooling on the P&O of milk
19 from sources far removed from the P&O historic milk
20 supply.

21 Though open pooling was rejected by the
22 Secretary, the Reform Amendments brought about what can
23 only be described as something very close to open
24 pooling in a number of the 11 federal milk orders. As
25 a result, the milk order system is now undergoing to

1 consequences of what should have been but apparently
2 was not predicted.

3 The same need for corrective action which the
4 Secretary has already recognized and undertaken to
5 address in three of the 11 Federal Orders must also now
6 be recognized and addressed in the P&O. An examination
7 and comparison of the pre- and post-reform sources of
8 producers and pounds of milk pooled in the P&O
9 established beyond controversy the need for changes to
10 Order provisions which now operate to undermine the
11 purpose for which the Federal Order is established.

12 The Pre-Reform P&O Milk Shed. The pre- and
13 post-reform P&O marketing area is almost identical.
14 The Reform Amendments added one unregulated Southwest
15 Oregon county to the P&O marketing area. The marketing
16 area now consists of all of Washington's 39 counties,
17 30 counties in Oregon and six counties in Northwestern
18 Idaho.

19 Prior to reform, over 98 percent of the milk
20 pooled in the P&O was produced within the marketing
21 area. 64 Federal Register at 16081. Of the less than
22 two percent of the pooled milk produced outside the
23 marketing area, the major portion was produced by
24 producers in the two Northern California counties who
25 accounted for 90 percent of the pooled milk produced

1 outside of the P&O marketing area.

2 Except for producers located in the six
3 counties within the marketing area, the Northern Idaho
4 Panhandle, no Idaho or Utah milk was pooled on Order
5 124. See the Market Administrator's Report, Pacific
6 Northwest and Southwest Order, Eastern Order Marketing
7 Area, July 1999, Page 5.

8 Please note that production in the Northern
9 Panhandle of Idaho is very modest. The major supplies
10 of Idaho milk are produced several hundred miles to the
11 south, in the Treasure Valley, which is in the Boise
12 area and in the Magic Valley, the Twin Falls area.

13 Post-Reform Expansion of P&O Pooled Milk.
14 Within a few months following the January 1st, 2000,
15 implementation of the Reform Amendments, a dramatic
16 expansion occurred in the pounds of milk pooled in the
17 P&O and the geographic area from which that milk
18 production was drawn.

19 The reason for the expansion is not difficult
20 to understand. First, the relative high Class 4 usage
21 in Order 24 compared to Order 135 made blend prices in
22 Order 124 high compared to Order 135. Secondly, the
23 P&O is unique among the 11 Federal Orders in requiring
24 no individual producer" -- let me read that again
25 because otherwise it won't make sense.

1 "Secondly, the P&O is unique among the 11
2 Federal Orders in requiring no individual producer
3 prior delivery to a pooled plant to qualify for
4 diversion. Absent such a requirement, plus no touch-
5 base provision, coupled with a 99-percent March through
6 August and 80-percent September to February diversion
7 limitation, constitutes virtually an invitation to open
8 pooling of milk for which the P&O blend offers a more
9 attractive return than the alternative adjacent to
10 Order 135.

11 Market Administrator Data show that prior to
12 July 2000, no Southern Idaho or Utah milk was pooled in
13 the P&O. From July 2000 through September 2001, a
14 dramatic change occurred that continues up to this
15 time. During that 15-month period, a total of
16 475,869,568 pounds of almost exclusively Class 3 milk
17 originating from Southern Idaho and Utah sources,
18 beyond the P&O historic milk shed, have been paper
19 pooled in the P&O.

20 The term "paper pooled" means milk that is
21 not historically associated with the P&O, milk that is
22 not delivered to plants in the P&O and milk that is not
23 needed currently nor in the foreseeable future to meet
24 the Class 1 needs of the P&O.

25 Exhibit 7 is our estimate of the loss to the

1 Order 124 producer price differential and blend price
2 resulting from the paper pooling of Southern Idaho and
3 Utah milk. This translates into an estimated 15-month
4 aggregate loss of \$6,625,000 to the producers who
5 constitute the historic sources supplied to the P&O
6 handlers.

7 The Secretary's April 2, 1999, Final
8 Decision, which consolidated the then-existing 31
9 Orders into 11 separate Orders was based on his
10 determination that overlapping route disposition in
11 milk procurement area are the most important criteria
12 to consider in the consolidation process. 64 Federal
13 Register 16045.

14 The pooling of distant milk and producers
15 located beyond the historic P&O procurement area is in
16 conflict with the Secretary's consolidation criteria.
17 It results in a transfer of pooled Class 1 dollars away
18 from producers in the P&O's traditional procurement
19 area to another area's producers, contrary to the basic
20 statutory purpose for which the FMMO system was
21 established.

22 Section 1608c(18)" --

23 Q 608?

24 A Too many Os, huh?

25 Q 6-0-8c(18), is that what you mean to say?

1 A That's what I meant. "Of the AMAA directs
2 the Secretary to establish prices to producers that
3 reflect "the price of feeds, the supply of feeds and
4 other economic conditions which affect the supply and
5 demand for milk in the marketing area to which the
6 Marketing Order relates."

7 We have underlined that last phrase there,
8 "in the marketing area to which the Marketing Order
9 relates." That is our emphasis. It is worth
10 emphasizing.

11 "The flawed Reform Amendments that permit the
12 artificial paper pooling transfer of P&O pooled dollars
13 from producers for whose benefit the P&O was
14 established to producers totally unassociated with the
15 P&O marketing area is contrary to the 11 separate Order
16 structure established by the Secretary. It is
17 contrary, also, to the statutory 608c(18) requirement
18 that producers who actually supply the "demand for milk
19 in the marketing area" receive a price that reflects
20 the pooled proceeds arising from that demand.

21 NMMF submits that amendment of the P&O is
22 necessary to insulate the P&O pooled proceeds from
23 their unwarranted dilution in violation of the pricing
24 standards of the AMAA. The amendments that we propose
25 are designed to ensure that the producers whose milk

1 constitute the daily and reserve supply for the
2 marketing area's demand for milk receive the price that
3 reflects that demand.

4 Summary Explanation of Proposed Amendments.
5 Proposals 1 and 2 in the Notice of Hearing propose
6 changes to existing provisions of the P&O relating to
7 pooled plant and producer milk, a definition aimed at
8 curing the present paper pooling problem that has
9 plagued the operation of the Order.

10 A. Change in Diversion Limits.

11 Proposal Number 2 proposes amendment of
12 Section 1124.13 to change the existing 80-percent
13 September to February and the 99-percent March to
14 August diversion limits to not more than 80 percent
15 during each month of the year in the quantity of
16 producer milk received during the month that a handler
17 may divert to non-pooled plants.

18 On January 4, 2001, the P&O Market
19 Administrator, acting pursuant to Section
20 1124.13(e)(5), decreased from 99 percent to 80 percent
21 the percentage of producer milk that may be diverted to
22 non-pooled plants during each month from March through
23 August 2001. Our Proposal Number 2 would simply
24 continue in effect permanently the Market
25 Administrator's Temporary Revision.

1 B. Addition of Touch-Base Provision.

2 The proposal to add to the producer milk
3 definition of Section 1124.13 a condition that milk of
4 a dairy farmer shall not be eligible for diversion
5 unless at least six days' production of such dairy
6 farmer's production is physically received at a pooled
7 plant during the month is designed to ensure that any
8 milk pooled be held to at least the same performance
9 standard as the 20-percent shipping requirement of the
10 pooled supply plants.

11 The 20-percent shipping requirement, coupled
12 with the 80-percent diversion limit, will require not
13 less than 20 percent of a plant's receipts to be
14 delivered to pooled distribution plants each month.
15 The six-day delivery requirement for each producer is
16 intended to equate, 20 percent times 30 days, to the
17 20-percent standard for supply plants.

18 The six-day touch-base delivery requirement
19 for each dairy farmer's production to qualify as
20 producer milk will be included in the total quantity of
21 milk received at a supply plant to determine whether it
22 has met the 20-percent minimum shipping requirement for
23 pooled plants.

24 Under our proposals, the Market Administrator
25 will continue to have the authority, not granted by the

1 P&O, to increase or decrease not only the diversion
2 limits of the P&O but also the proposed delivery day
3 requirement to qualify as a producer.

4 C. Addition of Cooperative Pooled
5 Manufacturing Plant Definition.

6 Prior to reform, it was not necessary to use
7 touch-base provisions in the P&O. The market area ran
8 smoothly with limited requirements because the producer
9 location adjustment rules largely discouraged the
10 attraction of out-of-area milk.

11 The addition of a touch-base provision,
12 however, makes it necessary to add provisions for a
13 cooperative pooled manufacturing plant. These
14 provisions will identify cooperative manufacturing
15 plants within the marketing area as pooled plants which
16 alone or as part of a system of plants within the
17 marketing area as pooled plants which alone" -- "of
18 plants which must meet pooled delivery requirements by
19 delivering 20 percent of cooperative member milk to
20 distributing plants.

21 This will allow the cooperatives operating
22 these plants to divert close-in member milk to fluid
23 plants while member milk close to manufacturing plants
24 can be delivered there. This will allow the already-
25 quite-efficient system to continue to function without

1 the disruption of moving each producer's milk to a
2 fluid plant six days a month.

3 The proposed cooperative pooled manufacturing
4 provision is similar to the provision in other Orders.

5 See Section 1131.7(d) Arizona, Las Vegas Order, and
6 Section 1135.7(d) Western Order.

7 D. Delete from Pooled Supply Plant
8 Qualifying Shipments, Milk Delivered Directly to Pooled
9 Distributing Plants Pursuant to 9(c) or Diverted to
10 Another Pooled Plant.

11 With the addition of the cooperative pooled
12 manufacturing plants, the current supply plants in the
13 P&O will change their status to the new definition. It
14 will no longer be useful to count as qualifying
15 movement for pooled plant qualification a supply plant
16 handler's diversion to pooled plants or cooperative
17 9(c) deliveries."

18 Q It was your intent to strike the word
19 "plowed"?

20 A It was. It turns out to be a superfluous
21 word.

22 "In addition, this change is proposed to
23 prevent the creation of supply plants in areas outside
24 the P&O marketing area that could associate themselves
25 with the P&O at supply plants without delivering any

1 milk to the market from the supply plant and then use
2 that supply plant's diversion rights to pool additional
3 milk that is otherwise not associated with the P&O.

4 E. Addition of Provisions for Unit Pooling
5 of a System of Plants Operated by Cooperatives.

6 The purpose of this addition is to allow
7 cooperative pooled manufacturing plants to combine as a
8 system to meet pooled delivery requirements. This will
9 allow the current system to continue to run
10 efficiently. This provision also allows the Market
11 Administrator flexibility in adjusting the delivery
12 requirements without going to a full hearing.

13 Section 4. Emergency Conditions Warrant
14 Omission of the Recommended Decision.

15 NMMF submits that the existing P&O diversion
16 provisions have caused and continue to cause the NMMF-
17 associated producers significant and irreparable
18 economic loss that only the prompt implementation of
19 corrective and mandatory action can cure.

20 The NMMF proposed amendments are submitted on
21 behalf of 98 percent of the producers historically
22 associated with the P&O. No closing, conflicting or
23 additional proposals have been noticed for
24 consideration at this hearing. Prompt action on NMMF's
25 proposal is needed to abate the economic loss that is

1 currently being suffered by the producers who are the
2 intended beneficiaries of the P&O.

3 5. Extension of the January 4, 2001,
4 Temporary Decrease in Diversion Limits.

5 It cannot be predicted how long it will take
6 to reach a decision in the matters presented at this
7 hearing. Therefore, NMMF proposes that the reduction
8 of diversion percentages from 99 percent to 80 percent
9 established in the January 4, 2001, action of the P&O
10 Market Administrator, be extended through at least
11 August 2002.

12 Producer Milk Being Double Pooled. NMMF is
13 deeply concerned with the loophole in the Reform
14 Federal Order Rules that allows producers from
15 California who are pooled in the California pooling
16 system can also in some circumstances be pooled in some
17 Federal Orders.

18 This practice does not occur in the P&O.
19 While it appears there are some protections in the
20 definition of a dairy farmer for other markets found in
21 1124.12(b)(5), NMMF suggests that the Secretary review
22 this issue and adopt clarifying language that disallows
23 the pooling of the same milk in two Orders, whether
24 state or federal.

25 This concludes our prepared testimony."

1 JUDGE HUNT: Before we proceed with
2 questions, let's take a 10-minute break.

3 (Whereupon, a recess was taken.)

4 JUDGE HUNT: If you'll take your seats,
5 please, we'll resume the hearing. Back on the record.

6 Mr. Berde?

7 BY MR. BERDE:

8 Q Bill, directing your attention to your
9 statement on Page 4 relating to the six-day delivery
10 requirement as a condition for eligibility for
11 diversion, is that six-day provision that is contained
12 in your proposal designed to act as an economic
13 disincentive, so to speak, to discourage the paper
14 pooling of milk?

15 A That -- that is definitely correct. The --
16 the old location differential provided a disincentive
17 for milk being pooled in the P&O because of distance.
18 We have to find something to replace that, this
19 required six-day delivery system is part of it, and in
20 looking at that, I think I must stress every time I
21 talk about it, that the six days is designed to be
22 equivalent to the 20-percent supply plant requirement
23 within the Order. They're not laying anything on that
24 tougher than what's required in our own Order.

25 Q And the six-day delivery requirement, the

1 burden of that requirement is designed to overcome your
2 -- the estimated benefit of what otherwise would be the
3 right to paper pool that milk?

4 A Yeah. That certainly would be the outcome.
5 That isn't the way we did the math to get to the six
6 days because we believed that the -- if it's going to
7 be pooled in your market, it must be based on
8 performance and performance is delivery into your
9 market.

10 Q And this is -- this might be analogized to
11 what in the good old days of pre-reform was the
12 location differential producers who were located some
13 distances from the marketing area basing point acted as
14 a similar disincentive, did it not?

15 A Absolutely.

16 Q And this is designed to substitute for what
17 we no longer have as a location adjustment for
18 producers?

19 A Right. It is clear from our discussions and
20 our attitude towards the whole thing, that we would
21 rather have those location differentials re-
22 established. We understand that the new systems are
23 not going to allow that, and we must find a replacement
24 for that that gets back to good, decent, sensible
25 marketing.

1 Q Now, you -- in the introduction of your
2 statement, you referred to "48 independent producers"
3 who, in addition to the member cooperatives of the
4 Federation that you represent here, is that correct?

5 A That's correct.

6 Q Would you describe the relationship and how
7 those 48 independent producers become part of your
8 organization?

9 A Okay. The independent producers are those
10 producers who directly deliver their milk to handlers,
11 Class 1 handlers, who are pooled in our market.

12 The way that they are associated with our
13 organization is via a milk marketing agreement. Each
14 one of them has signed a separate agreement with our
15 organization. That makes them a member of the
16 organization.

17 So, we have two classes of members. One is
18 the cooperatives are members and that brings all their
19 members in, and the second group is the independent
20 producers, the 48 that signed our membership.

21 Q And it's by reason of that arrangement that
22 you are able to say that your testimony is supported by
23 98 percent of the producers in the market?

24 A That's exactly right.

25 Q All right.

1 MR. BERDE: The witness is available for
2 cross examination, Your Honor.

3 MR. MARSHALL: Doug Marshall.

4 CROSS EXAMINATION

5 BY MR. MARSHALL:

6 Q Mr. Van Dam, are you available to be recalled
7 for testimony later in this hearing?

8 A Yes, I certainly am. I'll be here for the
9 duration of the hearing.

10 MR. MARSHALL: Then I'd like to reserve my
11 questions for a later point in the hearing.

12 JUDGE HUNT: All right. Yeah. Mr. English?

13 CROSS EXAMINATION

14 BY MR. ENGLISH:

15 Q Good morning, Mr. Van Dam. Charles English
16 with Suisse Foods.

17 Let me begin and maybe discuss a little bit
18 this California issue. As I think you are aware, I'm
19 in particular very sympathetic to your concern with
20 respect to California milk potentially in the future
21 being pooled on this Order at the same time drawing
22 from the other Order.

23 You've seen this show before in another part
24 of the country, right?

25 A Yes, I have.

1 Q And I'm wondering if I might therefore turn
2 to your discussion where you asked for some
3 clarification of the producer for other markets
4 provision, a provision that didn't exist in this kind
5 of format in these other Orders, and I'd like to
6 discuss with some concepts, since you have raised the
7 issue of what we might do with respect to pooling.

8 Right now, the potential loophole, as I see
9 it, help me out here if I'm wrong, but as I see it, the
10 provision as written says a dairy farmer whose milk was
11 received at a non-pooled plant during the month from
12 the same farm is other than producer milk, but if the
13 milk is diverted from a plant under Pacific Northwest,
14 subject to the diversion limitations but nonetheless is
15 lower than the diversion limitations, it is producer
16 milk, correct?

17 A Yes.

18 Q And therefore, you could conceivably have
19 milk diverted to a California non-pooled plant that
20 isn't producer for other markets but at the same time
21 pulls money both from the Pacific Northwest and from
22 California system, correct?

23 A It appears that that could happen. That is
24 our -- you're right on what our wording is.

25 Q Okay. And I -- and I -- I agree with you. I

1 think that's a concern.

2 So, if the Secretary deemed this to be a
3 concern, one way to deal with that on the producer for
4 other markets would be to further define milk as other
5 than producer milk or, for instance, as milk received
6 and priced and pooled under a plant regulated by a
7 state system with marketwide pooling, correct?

8 A Yes. That sounds like a good solution. That
9 provision is particularly difficult to read because it
10 looks like it involves a double negative, and it
11 certainly would be nice if they'd write it more -- with
12 more clarity, but I think that will be a suitable
13 solution.

14 Q All right. Thank you.

15 I have a technical issue for a moment.
16 Presently, and in Part 13, Proposal 2, 13(d)(4), you
17 are renumbering with the change to make it (d)(5),
18 correct? E. I'm sorry.

19 A Ask that question again.

20 Q All right. You are effectively asking (e)(4)
21 to be renumbered as (e)(5), correct?

22 A Let me be sure that is (e)(5).

23 Q (e)(5) in the Notice of the Hearing shows up
24 on Page 7 as a rewrite, and you are adding -- you're
25 basically changing the (e)(1) to (e)(2), correct?

1 A That's correct.

2 Q Except for the touch-base provision?

3 A Yes.

4 Q Okay. Now, let me ask you then about this
5 sort of series of proposals and ask first, when you
6 discussed the concept of allowing cooperatives with
7 those plants close-in member milk to be able to divert
8 milk that is the closest in, do you anticipate that if
9 the Market Administrator has to increase shipping
10 percentages, he can do so by looking at which plants
11 have that close-in milk; that is to say, when you act
12 -- when you say that the Market Administrator could
13 increase the shipping percentages under (c) or (d),
14 could he -- actually (c) and (d) is the language in the
15 proposal.

16 Could he look at plants under (d) only and
17 require those to make increased shipments without
18 increasing under (c) as well?

19 A You're starting to touch on areas that I
20 don't feel terribly confident on, --

21 Q Okay.

22 A -- but my understanding would be that the
23 Market Administrator would make the change that would
24 affect everybody.

25 Q Okay.

1 A (c) and (d).

2 Q All right. That's -- that's -- I'm asking
3 what your intent is.

4 A That's what our intent is.

5 Q And then you say, "With the addition of
6 cooperative pooled manufacturing plants, the current
7 supply plants in the P&O will change their status to
8 the new definition."

9 A Yes.

10 Q Will there be new plants, new facilities, to
11 your knowledge, that will also qualify now under the
12 new provision that did not qualify under the old
13 provision?

14 A Well, I can only think of one new plant, and
15 I can't see how this changes their status. I think
16 everybody would -- everybody that's now a supply plant
17 will undoubtedly become a cooperative manufacturing
18 pooled plant.

19 Q Do you know of additional facilities that
20 expect or intend to become pooled plants under this
21 change provision?

22 A Not additional facilities, I do not know of
23 any.

24 Q Then let me turn to the touch-base provision,
25 and let me say that -- that as an operator of fluid

1 distributing plants, we agree with the concept of the
2 touch-base provision. But let me ask about the idea of
3 -- of six days.

4 Do you know of any other Order that would or
5 does have a provision that equates the percentage of
6 shipping requirements with the touch-base in the way
7 you have?

8 A No, I'm not aware of any that do that.

9 Q Have you studied for this hearing any of the
10 Orders particularly in the Southeast with respect to
11 the percentage of supply plant shipments as compared to
12 the touch-base provisions in those Orders?

13 A We briefly looked at that issue, but in
14 particular, we were looking at other markets that had
15 up to a six-day requirement. Those were of interest to
16 us and the Florida market has that.

17 Q Okay. So, for instance, you know that
18 Florida has a six-day requirement but that requirement
19 is only July through December, correct?

20 A Correct.

21 Q So, it's -- it's less than that in -- in
22 other months, correct?

23 A That's correct. Four days, I believe.

24 Q Now, is that Florida or is that Appalachia,
25 to your knowledge, that has that?

1 A I believe it's Florida.

2 Q Regardless, do you know what the shipping
3 percentage is for a supply plant in Florida?

4 A I do not recall that.

5 Q Would you disagree with me that it's 60
6 percent?

7 A That sound appropriate.

8 Q So, in using your analysis, if it were 60
9 percent, then however the Secretary got to the number
10 of days that are in Order 6, it should be 18 days under
11 your analysis, correct?

12 A If they were to apply to the same region that
13 we apply to, yes.

14 Q Do you agree that reasoning ought to apply
15 across federal order system as being somewhat
16 consistent, so that the Orders operate somewhat
17 consistently?

18 A After attending two of the three previous
19 hearings and seeing the problems and the -- and the
20 amount of milk that can flow across boundaries from all
21 directions, I can see why there is not any particular
22 consistency between all Orders on a lot of these
23 issues, because they're very different.

24 This is a different Order than that one, and
25 we believe this is the correct solution for our orders

1 and allows the Director or the Market Administrator
2 sufficient flexibility to achieve the objectives of the
3 market.

4 Q Do you agree that a touch-base provision that
5 is set too high can lead to inefficient movements of
6 milk?

7 A Not in this case, I don't.

8 Q Generally?

9 A It certainly could in a general -- in a
10 general case, it could. We are using it differently in
11 this case, and we're using it for a specific purpose,
12 and we do not believe that it will lead inefficient
13 shipment of milk.

14 Q But nonetheless, you're not aware of another
15 Order that would equate the number of days based upon
16 the percentage of supply?

17 A No, I'm not.

18 Q Thank you.

19 MR. ENGLISH: That's all. I have.

20 JUDGE HUNT: Yes, Mr. Beshore.

21 MR. BESHORE: Marvin Beshore.

22 CROSS EXAMINATION

23 BY MR. BESHORE:

24 Q Good morning, Mr. Van Dam.

25 A Good morning.

1 Q You've indicated in your testimony that Dairy
2 Farmers of America, DFA, is not a member of your
3 Federation, but you're aware, nevertheless, that it is
4 supporting the proposals in this hearing?

5 A Yes, I am.

6 Q Okay. And you've alluded to having been
7 present and observed hearings that have preceded this
8 in other Orders around the country to address similar
9 phenomenon, similar programs?

10 A Yes. I was at two of the three.

11 Q Okay. And you're aware that DFA has taken a
12 consistent position in those hearings to provide for
13 amending Orders to require that all milk pooled on the
14 Orders perform to the requirements of the Order in
15 order to -- and that's been consistent in those -- in
16 some of those Orders, even though it was not in DFA's
17 self-interests because it was pooling milk from distant
18 areas as was allowed under the Order, correct?

19 A That is correct.

20 Q And the same is true in this case?

21 A That's correct in this case.

22 Q Okay. Now, just so there's no
23 misunderstanding or misapprehensions about how things
24 are working in this Order, at the top of Page 2 of your
25 statement, you used the hypothetical of milk in and out

1 of Tompkins County being potentially put on this Order
2 and drawn across locations, but that has not occurred,
3 correct?

4 (Power Failure)

5 JUDGE HUNT: All right. Does anyone object
6 to Proposed Exhibit 6 being made part of the record?

7 (No response)

8 JUDGE HUNT: Hearing no objections, then
9 Exhibit 6 is received into evidence.

10 (The document referred to,
11 having been previously marked
12 for identification as Exhibit
13 Number 6, was received in
14 evidence.)

15 JUDGE HUNT: Mr. Marshall?

16 Whereupon,

17 DANIEL McBRIDE

18 having been first duly sworn, was called as a witness
19 herein and was examined and testified as follows:

20 JUDGE HUNT: Would you state and spell your
21 name, please?

22 THE WITNESS: My name is Daniel S. McBride,
23 M-C-B-R-I-D-E.

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DIRECT EXAMINATION

BY MR. MARSHALL:

Q Mr. McBride, please proceed to read your prepared testimony.

MR. MARSHALL: And Your Honor, I might add that I believe that copies have been distributed. We may be a bit short, but I would ask those who do not get a copy to share.

THE WITNESS: "My name is Daniel S. McBride. I'm testifying today on behalf of Dairyville Farms, which does business under the name of Northwest Dairy Association and which is usually referred to as NDA.

My title is Director, Milk Pricing Program for NDA. I'm responsible for coordinating all matters pertaining to Federal Orders and have done so since leaving the Market Administrator's Office to join the NDA staff in 1986.

Background information about NDA. NDA is a cooperative association which acts as a handler in the Pacific Northwest Federal Order Market, Order 124. NDA represents approximately 620 producers whose milk is associated with that Order. Therefore, the provisions being considered at this hearing are of vital interest to NDA.

NDA is the parent company of West Farm Foods,

1 which operates three bottling plants regulated under
2 Order 124 as well as manufacturing plants at Chehalis,
3 Lynden and Sunnyside, all in Washington State.

4 Both NDA and West Farm Foods are also heavily
5 involved in the Western Milk Marketing Order, Order
6 135. NDA is a member of Northwest Milk Marketing
7 Federation.

8 We're here today to support their proposals.

9 We endorse those as our own. They are designed to
10 prevent what we call "artificial pooling" of out-of-
11 area milk, by which we mean, the pooling of milk on
12 Order 124 that is not attached to the market by the
13 traditional measures of attachment but which is
14 artificially pooled on the Order for the sole purpose
15 of drawing money out of the Order 124 pool.

16 We at NDA are very concerned about that
17 practice and that we are asking USDA to adopt what we
18 think are reasonable changes which will stop the
19 practice.

20 Just to clarify our position, NDA is not
21 concerned about milk produced outside the market area
22 that regularly serves the market. For example, we have
23 five members of our cooperative who produce milk in
24 California and whose milk usually goes to the West Farm
25 Foods Bottling Plant in Medford, Oregon.

1 Similarly, the milk from a group of NDA
2 producers near Cottonwood, Idaho, just south of the 124
3 Order Marketing Area, goes to a Class 1 handler in
4 Spokane, Washington.

5 Background on Pool Loading. The proposals
6 being heard in this hearing all relate to the practice
7 we call pool loading; that is, pooling milk from an
8 Order's marketing area on to another Order with no
9 economic justification to cause that milk to actually
10 be delivered to that Order but for the sole purpose of
11 shifting revenues from the benefit of a cooperative for
12 the benefit of producers in the loading Order.

13 As we use the term, such as "loaded", milk
14 typically continues to be delivered to the plants
15 located near where it is produced and never delivered
16 to the market whose pool is being raided. As we see
17 it, such pooling is artificial because it is pooled
18 only on paper opportunistically for the reasons related
19 to the" --

20 BY MR. MARSHALL:

21 Q Excuse me, Mr. McBride. Did you mean for no
22 reasons related to?

23 A Yes. "For no reasons related to the service
24 of the affected market.

25 I want to begin by explaining how this is

1 possible. This has always been possible to pool milk
2 that is not physically delivered to the pooled plants
3 that serve the marketing area. All Orders permit some
4 portion of pooled milk to be diverted to non-pooled
5 plants, either inside or outside the Order.

6 I think it is fair to say that prior to the
7 1996-99 Reform process, every Order also had other
8 provisions which measured attachment to the market so
9 that milk that does not truly serve the market would
10 not share in the Order's returns through the pooling
11 mechanism.

12 Many Orders have had touch-base provisions by
13 which all milk must be delivered to pooled plants or
14 other plants with specified frequency. Such deliveries
15 demonstrate the attachment with the market.

16 Many Orders, including Pacific Northwest,
17 have a dairy farmers for other markets provision which
18 requires that if a dairy farmer serves multiple
19 markets, such a dairy farmer cannot be a producer under
20 the Order unless all of his or her milk is pooled
21 during the month.

22 We believe the intent was that those who are
23 not always part of this market could not use surplus
24 milk to raid Order 124 market while still primarily
25 serving the needs of another market.

1 Some Orders, including Pacific Northwest,
2 formerly had provisions which applied an economic
3 factor to insure attachment. Producers who claimed to
4 be serving the market were free to do so, but if they
5 delivered their milk to a plant outside the Order,
6 closer to home, the producer would receive less for the
7 milk. That was because the value of the milk to the
8 market was reduced if it was located away from the
9 market.

10 There was a basic application of the
11 principle of location pricing. If milk outside the
12 marketing area is worth less than it would be if it was
13 next to the plants in the marketing area, until money
14 is spent to haul it to the plant in the marketing area.

15 Since milk delivered to plants outside the area has
16 not been transported, it has lots of miles to go and
17 transportation costs to board before it attains the
18 same value to the Order's plants as milk which has been
19 delivered to the market.

20 For that reason, the prior Order provisions
21 established that a location value that diminished mile-
22 by-mile the further pooled milk was delivered from the
23 marketing area. To illustrate how that prior Order
24 provision worked, the NDA attempted to pool on the old
25 Order 124 milk that was from our producers in the

1 Southwest Idaho while delivering that milk day in and
2 day out to our plant in Caldwell, Idaho. We would have
3 drawn the Pacific Northwest Order blend price, less
4 location adjustment of 55 and a half per hundredweight,
5 on the milk received at Caldwell.

6 That location adjustment provision
7 effectively would have kept us from doing such
8 artificial pooling of Idaho milk had we wanted to, even
9 though there were periods when it would have been to
10 NDA's financial advantage to have pooled Idaho milk on
11 Order 124.

12 All that changed, of course, on January 1st,
13 2000. The problem was not that USDA elected to
14 establish a National Class 1 Pricing Service, the
15 problem was that when USDA elected to utilize that
16 service as the sole location adjustment factor for all
17 other classes of milk, the market attachment provision
18 just described was removed from the Order and not
19 replaced with another measure of market attachment.

20 We do not believe that that impact on the
21 manufacturing milk was intended. Indeed, as we review
22 the final decision, Docket DA-97-12 April 2nd, 1999, we
23 note that all of the comments regarding location
24 pricing focused on milk for fluid use. For example,
25 the second paragraph of the 27-page discussion of Class

1 1 pricing structure introduces the subject finally.

2 The reform effort provides that opportunities
3 to consider and establish a nationally-coordinated
4 Class 1 Pricing Service that uses location adjustments
5 to the Class 1 differential levels to price milk for
6 fluid use in every county of the United States.

7 From that starting point, however, we find
8 that milk for manufacturing assumes location values
9 that mirror the Class 1 values with the curious result
10 that milk pooled on a given market can be valued based
11 on supply/demand conditions halfway across the country
12 or further.

13 How did this happen? To try to determine
14 this, we had searched the 1999 Final Decision. There
15 was no recommended decision under the Expedited
16 Procedures established by Congress.

17 After searching the Final Decision page-by-
18 page and using the marvels of modern software to
19 conduct appropriate word searches, we had concluded
20 that there was no discussion as to why cost and pricing
21 service was applied to adjust blend price pay-off on
22 milk delivered to manufacturing plants distant from the
23 Order area.

24 We suggested that this may simply have been
25 an oversight which could easily have occurred, given

1 the complexity of rewriting Orders and the process that
2 deprives the industry an opportunity to directly
3 comment on the complete Order framework.

4 Still, the decisions to use the Class 1
5 Pricing Service to establish location values of
6 manufacturing milk was not surprising. Previously, it
7 had been done the same way. The only change in the
8 Order was that the National Pricing Service for Class 1
9 Milk was bumped aside, bumped aside the old practice of
10 using location adjustments to provide incentive to move
11 milk from manufacturing plants in the country to
12 bottling plants in populated areas.

13 To some extent, the location surface still
14 does this. For example, milk delivered to our
15 Sunnyside, Washington, plant in the country draws less
16 from the pool than the milk delivered to the Seattle
17 bottler, but ignoring the impact on the out-of-area
18 milk" -- "but by ignoring the impact on out-of-area
19 milk, a backwards incentive was introduced into Federal
20 Orders to move milk from manufacturing plants further
21 away to the Order's bottling plants in distant Order
22 areas."

23 Q Would you please reread that sentence? I
24 think you missed a word.

25 A "But by ignoring the impact on out-of-area

1 milk, a backwards incentive was introduced into Federal
2 Orders to move milk to a manufacturing plant further
3 away from the Order's bottling plants in distant Order
4 areas.

5 Cornell University had a computer model which
6 allocated milk supplies to plants and allocated
7 products from those plants to market centers and then
8 saw for the lowest system transportation cost, the
9 model produced, the price surface map, which
10 demonstrated that milk for both manufacturing and
11 bottling was worth more in the East than in the West.

12 USDA then used the model to establish a Class
13 1 Pricing Service but ignored the variable price
14 service under the Cornell model indicated for the
15 manufactured products. Nevertheless, USDA applied the
16 Class 1 service to govern location adjustments to
17 pooled draws from manufacturing plants.

18 Under the Pacific Northwest Order, milk
19 delivered to one of the cheese plants near Salt Lake
20 City, \$1.90 per hundredweight, had the same location
21 values as milk delivered to a pooled plant in Seattle.

22 That is because the base location value in the Pacific
23 Northwest is a \$1.90 in Seattle.

24 This turned upside down traditional theories
25 of location value. I would also point out in passing

1 that if milk pooled on Order 124 is delivered to other
2 areas in the country with higher location values, for
3 example \$2.90, such milk would be adjusted upward in
4 the value of what it draws from the 124 pool.

5 In the example, the \$2.90, minus a \$1.90, or
6 a dollar, even if it is sent to manufacturing plants in
7 the distant area.

8 Note that milk delivered to a cheese plant in
9 Utah had a greater location value than milk delivered
10 to our cheese plant in Sunnyside at a \$1.75 a
11 hundredweight for the purpose of adjusting the blend
12 price payments, even though the same Central Washington
13 milk often moves to the \$1.90 pooled plants in Seattle
14 and Portland. So, there is an incentive to move milk
15 from Central Washington to Seattle and Portland
16 bottlers but no incentive to move milk from Utah to the
17 same bottlers.

18 Because the blend price in the Pacific
19 Northwest is often higher than the Western Order blend
20 price at Salt Lake City, the Order system provides an
21 incentive for milk produced in Utah to be delivered to
22 cheese plants there rather than being delivered to a
23 Utah bottling plant. That is because that milk that
24 goes to Salt Lake City, to the Salt Lake City bottler,
25 it would be pooled in the Western Order and draw the

1 lower blend price.

2 In classic Federal Order analysis, this would
3 suggest that the potential for disorderly marketing
4 conditions. So, one irony is that if a Utah cheese
5 plant's milk is pooled on Order 124, the system
6 discourages that milk from moving to Salt Lake City
7 bottlers and provides absolutely no incentive to move
8 milk to the Pacific Northwest bottlers.

9 Another irony is that the greater value is
10 provided by the Order system at the expense of
11 producers in the Pacific Northwest, who are still
12 expected to serve the Pacific Northwest bottlers.

13 But the crowning irony is that the Order
14 system, based on the Cornell model, encourages Utah
15 milk to be pooled in the West while the economics in
16 the Cornell model show that milk should move east.

17 The foregoing explains what has happened over
18 the past year in this region. Dairy Farmers of America
19 pooled producers located in Utah whose milk, we
20 understand, was delivered to a cheese plant in Utah.
21 When that milk was artificially pooled in the Pacific
22 Northwest Order, the Utah milk draws higher blend price
23 than milk pooled in the Western Order.

24 Paradoxically then, the pooled draw from the
25 Order 124 on the milk delivered to the Utah cheese

1 plant has been higher than the pooled draw from the
2 Order 135, so on other milk delivered to Class 1
3 facilities in Utah. This has created disorderly
4 marketing conditions in two markets.

5 The Western Order has neighboring producers
6 with milk receiving different pooled values as
7 discussed above while in the Pacific Northwest Order,
8 proceeds of the pool loading were also in part used to
9 plus the market to obtain more in-market milk on which
10 the pool loading could be based. Four pounds of pool
11 loading for every one pound of new milk within the
12 Order area and delivered to pooled plants.

13 I do not know how I could explain all of this
14 to the members of Congress. We strongly suspect that
15 USDA does not want to have this difficulty of
16 explanation either, other than to say that it was a
17 mistake and is now being fixed.

18 In order to make the above argument on brief,
19 we ask that official notice be taken of the Market
20 Administrator's report published monthly by the Market
21 Administrator of Orders 124, 131 and 135. We ask that
22 official notice be taken for all documents published
23 through the date of briefing and the dates of any
24 comments that are due with respect to this proceeding."

25 Q May I interrupt here, Mr. McBride?

1 MR. MARSHALL: Your Honor, official notice
2 was requested in Exhibit 6 of the same series but only
3 through September of 2000. So, the significance of
4 this request would be that the Market Administrator
5 reports would be noticed as of any -- for any
6 publications issued through the dates of any comments
7 due with respect to this proceeding.

8 JUDGE HUNT: The comment period. Is that the
9 same documents that you say is in Exhibit 6?

10 MR. MARSHALL: Your Honor, Exhibit 6
11 identifies a series of five items of which official
12 notice was taken. Numbers 4 and 5 were the same data
13 series that we are requesting now official notice of
14 through the date of hearing -- excuse me -- the date of
15 comments in these proceedings, and thus the only
16 difference between what we're requesting and what has
17 already been noticed is that we are asking for notice
18 to be taken beyond September of 2001.

19 JUDGE HUNT: Does anyone object to taking
20 official notice of this document?

21 (No response)

22 MR. MARSHALL: Please proceed, Mr. McBride.

23 JUDGE HUNT: Okay. If there's no objections,
24 then official notice is taken as requested.

25 THE WITNESS: "In addition, I ask that

1 official notice be taken of the Cornell study which was
2 relied upon by USDA in the Reform proceedings and is
3 formally identified as Normative Estimates of Class 1
4 Price Across U.S. Milk Markets, by James A. Efrat,
5 Philip M. Bishop, Eric Kamerow, Andrew M. Novokick, and
6 Mark W. Stevenson.

7 The publication of Cornell Program on Dairy
8 Markets and Policy, RD 98-05, July 1998."

9 JUDGE HUNT: Anyone object to taking official
10 notice of that Cornell study?

11 (No response)

12 JUDGE HUNT: All right. Hearing no
13 objections, official notice is taken of that study.

14 MR. MARSHALL: Thank you, Your Honor.

15 BY MR. MARSHALL:

16 Q Please proceed.

17 A "To put in context the last few points of my
18 testimony, I am reviewing the process by which the most
19 significant measure of market attachment in the pre-
20 reform Pacific Northwest Order lower location value, if
21 not delivered to the market, was removed by the new
22 location pricing structure for Class 1 milk.

23 To summarize, before reform, the location
24 value where pooled milk was delivered would diminish in
25 proportion to the distance the further away the

1 receiving plant was from the bottling plants in the
2 marketing area.

3 During reform, the new theory of Class 1
4 location value was established, which, perhaps
5 unintentionally, provides an incentive to move milk to
6 a manufacturing plant which happened to be located in
7 an area that would have had a higher Class 1 value
8 rather than a bottling plant in the region that would
9 lower Class 1 value.

10 It happens because milk delivered to a
11 manufacturing plant has greater or lesser value,
12 depending on the pool to which it is attached. To
13 illustrate the above, the situation creates an
14 opportunity for artificial pooling to be used to pay
15 more to producers delivering milk to manufacturing
16 plants, more than other producers who deliver milk to
17 bottling plants.

18 I submit that this has created a potential
19 for disorderly marketing conditions. This is, of
20 course, a contradiction to traditional Federal Order
21 theory. We are focused today on one small aspect of
22 the contradiction; that is, that the new location
23 pricing system supplanted the prior measure of
24 attachment to the Pacific Northwest Market.

25 We note that other Orders have different

1 measures of attachment, such as touch-base and delivery
2 provisions, which were retained, but no such measures
3 were added to Order by Pacific Northwest which have
4 relied on location pricing to measure attachment rather
5 than touch-base. This change opened up the door to
6 pool loading.

7 The current pool-loading practice simply has
8 no place in the system of geographically-separate
9 Orders which were established in the 1999 Final
10 Decision, based on Commonality Criteria, such as
11 natural boundaries, like mountains, etc., Page 4 of
12 Section 2, entitled "Discussion of Materials, Issues
13 and Amendments to the Orders, Docket DA-97-12 April
14 2nd, 1999".

15 I'd like to point out that the following with
16 respect to the thinking behind the Final Decision. One
17 of the factors relied upon by USDA at the time of the
18 final decision was common utilization, Page 4 of
19 Section 2, entitled "Discussion of Materials, Issues
20 and Amendments to the Order".

21 It would make no sense for USDA to establish
22 an Order boundary between the Pacific Northwest and
23 Western Orders in part because different utilizations,
24 more Class 4 in Pacific Northwest and more Class 3 in
25 the Western, if the intent is to allow Western Order

1 milk to be paper pooled on the Pacific Northwest Order
2 whenever a Class 4 price is higher than Class 3.

3 One of the other factors that has led USDA to
4 retain the Pacific Northwest Order area virtually
5 intact during the Reform consolidation process was that
6 there was almost no relationship between the Pacific
7 Northwest area and the Southwest Idaho/Eastern Oregon
8 Marketing Areas and no basis for a consolidation,
9 quoting the Final Decision, on Page 138.

10 Little has changed since 1999. There is now
11 a bit more milk moving in condensed form from the West
12 Farm Foods Plant in Jerome, Idaho, to fill unused plant
13 capacity in the West Farm Foods Plants at Chehalis and
14 Linden, Washington. Because it is condensed to reduce
15 transportation costs, the milk cannot be used by
16 bottlers.

17 Furthermore, that situation is temporary and
18 is expected to end within a year when the current
19 expansion of the Jerome facility is complete. To the
20 best of our knowledge, none of the pool-loaded milk
21 from the farms in Southern Idaho or Utah is actually
22 delivered to plants within the Pacific Northwest
23 Marketing Area.

24 As I have just suggested, one of the factors
25 used to divide up the different marketing areas was

1 overlapping areas of milk supplies. This had been a
2 traditional consideration in Federal Order theory for
3 decades, but it is interesting to note that the
4 rationale for doing so as expressed in the Final
5 Decision was that the competitive factors affecting the
6 cost of the handler's milk supply are influenced by the
7 location of the supply.

8 The pooling of milk produced within the same
9 procurement area under the same Order facilitates the
10 uniform pricing of producer milk. We note that when a
11 handler in a distant lower-paying Order uses artificial
12 pooling to draw better returns from the Pacific
13 Northwest or any other higher-paying Order, the
14 intended uniform pricing in the distant Order is
15 frustrated.

16 It is even more frustrating to the goal of
17 the Federal Order System because it is an opportunity
18 that is difficult to take advantage of, except by large
19 multiorder cooperatives. Such an unintended favoritism
20 of large cooperatives is politically risky and must be
21 addressed if political support for the Federal Orders
22 is to be maintained.

23 Indeed, many critics of the Federal Orders
24 see the present pool-loading phenomenon as confirming
25 that in their eyes, the system is something of a joke.

1 If so, it is a joke that USDA must correct if we were
2 to maintain the support for the Federal Milk Marketing
3 Orders.

4 We are aware of other hearings affecting
5 other Orders on this same issue. We urge the
6 Department to develop a national approach to ending
7 this pool-loading practice. In order for the foregoing
8 points to be fully considered by the Department in this
9 proceeding, I ask that official notice be taken of the
10 1999 USDA Proceedings, known colloquially as the
11 "Reform Process", and as discussed earlier in my
12 testimony.

13 Specifically, we ask that official notice
14 should be taken of all the documents relating thereto
15 which appear on the USDA website at
16 <http://www.ams.usda.gov/fmor>."

17 Q May I interrupt here, Mr. McBride?

18 MR. MARSHALL: Your Honor, in Exhibit 6 and
19 the earlier request from Northwest Milk Marketing
20 Federation for official notice, official notice was
21 granted to the Final Decision itself and to the final
22 rule, and we are asking for a broader scope of official
23 notice to include all materials on the website which
24 include hearing testimony as well as exhibits.

25 JUDGE HUNT: Any objections to -- yes, Mr.

1 Yale?

2 MR. MARSHALL: May I correct myself, Your
3 Honor? The website does not include hearing testimony
4 because there was no hearing in that proceeding. I
5 apologize.

6 MR. YALE: That's where I was headed.

7 MR. MARSHALL: So, I'm not sure there is any
8 distinction. I'm not asking for anything beyond that.
9 I don't think I am. I apologize. This has already
10 been done. No additional official notice need be
11 taken.

12 THE WITNESS: "Diversion Limits. Proposal
13 Number 1 would establish the diversion limitations on
14 the Order at the level of 80 percent. This would
15 confirm the administrative action of the Market
16 Administrator earlier this year to revise the diversion
17 limits to 80 percent.

18 Effective with the Order revisions that
19 became effective in January of 2000, the diversion
20 limits of Order 124 have been 80 percent September
21 through February and 99 percent March through August.
22 I would like to review what I understand to be the
23 history of the provisions.

24 First, those limits resemble the limits which
25 existed prior to the January 2000 which were a hundred

1 percent March through August and 80 percent September
2 through April. We do not know why the slight changes
3 were made, 99 percent rather than a hundred, and
4 loosening of March and April to 99, but the practical
5 result is that the new Order is similar to the old one.

6 The pre-2000 diversion limitations, a hundred
7 percent and 80 percent, were proposed by NDA during the
8 Order merger process that created the Pacific Northwest
9 Order which became effective February of 1989. Our
10 philosophy at the time, which I believe mirrored the
11 USDA's philosophy, was that all milk within the
12 marketing area should be pooled to prevent disorderly
13 marketing conditions.

14 We propose the 100-percent figure to ensure
15 that all cooperative associations operating in the
16 market could pool. It made sense to us because all of
17 the cooperatives were serving the market in one fashion
18 or another.

19 The second historical point I would like to
20 make is that the hundred-percent limit never created
21 what we call "artificial pooling" of out-of-area milk
22 because there was also a location adjustment provision
23 that applied to out-of-area milk as described above.

24 Because of the recent pool-loading phenomena,
25 which is also described above, there is now a down side

1 to the hundred percent or 99 percent diversion limit
2 figure which would allow virtually unlimited pool
3 loading.

4 For those reasons, it is time to return
5 diversion percentages of the Pacific Northwest Order to
6 the level that reflects the local market conditions.
7 We believe that the level is 80 percent for the
8 following reasons.

9 1. No difficulty in pooling milk
10 traditionally associated with the Order has been
11 experienced in the past during periods when the
12 diversion limits were at 80 percent, and no such
13 difficulties have been experienced over the past year
14 since the Market Administrator administratively changed
15 the limit to 80 percent.

16 We anticipate no pooling difficulty in the
17 future. Most marketing organizations in this region
18 have high Class 1 deliveries. The two exceptions are
19 NDA and Tillamuck County Creamery Association, which
20 share a market service through Oregon Milk Marketing
21 Federation along with Farmers Cooperative Creamery and
22 Northwest Independent Milk Producers.

23 We believe the OMMF group can and will easily
24 continue to meet the 80-percent diversions requirement
25 by combining diversions.

1 There is no shortage of milk within the
2 Pacific Northwest Marketing Area to serve the fluid
3 milk bottling plants. We are aware of no situations in
4 which a plant has been unable to receive milk, except
5 in unusual conditions of a spike in demand with
6 insufficient notice to suppliers in the market.

7 Deliveries to Market. The most important
8 aspect of Proposals Number 1 and Number 2 is to provide
9 artificial pooling of milk that is not regularly
10 delivered to plants within the marketing area. As
11 proposed, a producer whose milk is pooled on the
12 Pacific Northwest Order must actually deliver milk to a
13 plant in the marketing area at least six days of
14 production during the month.

15 Proposal Number 1 would establish for the
16 first time in the Pacific Northwest Order a cooperative
17 pool manufacturing plant provision. Similar language
18 exists today in the Western Order. The effect of the
19 new section, 1124.7(d), is that a manufacturing plant
20 owned by a cooperative is considered a pooled plant for
21 the purpose of the six-day delivery requirements of the
22 Order.

23 Actual delivery to such plant could not be
24 used as a base for diversions. I want to make it clear
25 that it is our intention, and I believe also the

1 intention of the Northwest Milk Marketing Federation,
2 the proposed Section 1124.13(e)(2) may be a bit vague
3 on that. So, we suggest that the language thereof be
4 clarified.

5 Specifically, we suggest that 13(e)(2) be
6 modified to provide that of the quantity of producer
7 milk received, the handlers adverse to non-pooled
8 plants and cooperative pool to manufacture plants not
9 more than 80 percent. Also, there should be a comma
10 before the handler diverts, right after the reference
11 to Section 1000.9(c).

12 Proposal Number 2 would establish for the
13 first time in the Pacific Northwest Order a requirement
14 that at least six days of producer's milk be delivered
15 each month to a pooled plant. That is a proposed
16 Section 1124.13(e)(1).

17 Taken together, Proposals Number 1 and Number
18 2 would recognize as a sufficient touching of base of
19 six days of milk during the month is delivered to a
20 pooled distributing plant or a cooperative
21 manufacturing plant. We can think of no major plants
22 located within the Pacific Northwest Marketing Area
23 which could not be used for this purpose.

24 Another part of the amendment being proposed
25 would eliminate the supply plant provision of the

1 Section 1124.7(c)(2) and (c)(3). Currently, supply
2 plants can be located in or outside the marketing area.
3 Pooled manufacturing plants, as proposed by definition,
4 would have to be located in the marketing area.

5 The proposed deletions of Sections
6 1124.(c)(2) and (c)(3) would prevent supply plants
7 located outside" --

8 BY MR. MARSHALL:

9 Q You might have misread that section. Would
10 you clarify that, please?

11 A "The proposed deletion of Sections
12 1124.7(c)(2) and (c)(3) would prevent a supply plant
13 located outside the marketing area being established
14 for qualified milk on Order 124. Instead, milk must
15 move inside the marketing area to a pooled
16 manufacturing plant.

17 Together, these changes will accomplish the
18 two important things, to help ensure that milk pooled
19 will in fact be available to plants within the market,
20 if needed, and that if an adequate supply of fluid milk
21 is available to meet the market's needs and prevent
22 artificial pooling of distant milk using a supply plant
23 as a vehicle.

24 Under present provisions, milk could be
25 pooled using a pooled supply plant as long as 20

1 percent of the milk is delivered to the market's pooled
2 plants. The proposed touch-base language would
3 accomplish much of the same thing in a more direct way.

4 Rather than deliver 20 percent of all milk
5 from a supply plant six days, roughly 20 percent of
6 each producer's monthly milk production must go to the
7 market. Something like today's pooled supply plant
8 could continue to function in the future but the
9 diversions would be based on other sales direct to
10 pooled distributing plants.

11 Special California Consideration. We
12 recognize that USDA has held a number of hearings in
13 other Orders on similar subjects and that some of them
14 addressed the practice of pooling California milk and
15 drawing both California pool and the Federal Order
16 pool.

17 We have not seen that practice in this Order
18 and no language was proposed specifically to address
19 that. However, we do believe that the proposals which
20 USDA adopts here in Order 124 should resemble those
21 elsewhere.

22 If double pooling of California milk is
23 addressed elsewhere, we urge USDA to address it in this
24 Order. We feel it would be entirely appropriate within
25 the spirit of Proposals Numbers 1, 2 and 3 to do so.

1 While we do not know what language might be adopted in
2 other Orders, I will suggest a way this could be
3 addressed in the Pacific Northwest Order. That would
4 be to make one more change to Section 1124.13, in
5 addition to the change already proposed to add an
6 additional sentence so that it would read as follows:
7 "Milk of a dairy farmer shall not be eligible for
8 diversions unless at least six days' production of such
9 dairy farmer's production is physically received at a
10 pooled plant during the month. In addition, no milk of
11 a dairy farmer shall be eligible for diversions if any
12 portion of that milk is pooled under a state order with
13 a marketwide pool."

14 We note that this would address both the
15 California State Order and the Montana State Order,
16 both of which have marketwide pools.

17 Conclusion. NDA wants to thank the
18 Department for scheduling this hearing and to address
19 other concerns."

20 I'll take any questions.

21 Q Thank you, Mr. McBride.

22 I'd like to ask a few questions to follow up
23 on some of the things that have come up earlier in this
24 hearing and begin by directing your attention to your
25 own prepared testimony on Page 8, where you refer to

1 the "diversion limits in the Order and the
2 administrative action of the Market Administrator
3 earlier this year to revise the diversion limits to 80
4 percent."

5 Now, you were here earlier during Mr.
6 McBride's testimony, were you not? During Mr. Van
7 Dam's testimony, were you not?

8 A Yes, sir.

9 Q And you heard Mr. Van Dam request that the
10 reduction of diversion percentages from 99 percent to
11 80 percent established in the January 4th, 2001, action
12 of the Pacific Northwest Market Administrator be
13 extended through at least August of 2002. Do you
14 recall that testimony from Mr. Van Dam?

15 A Yes.

16 Q Does NDA join in making that request?

17 A Yes.

18 Q I'd like to turn your attention, please, to
19 Page 9, on the section referring to "Deliveries to the
20 Market", and the first two paragraphs of that section
21 with respect to "cooperative pool manufacturing plant
22 serving as a basis for the six-day delivery
23 requirements of the Order", and then you go on at the
24 bottom of Page 9 to say, "As proposed, deliveries to
25 such a plant could not be used as a base for

1 diversion."

2 I want to make it clear that that's the
3 intent of NDA, is it not?

4 A Yes, it is.

5 Q Is that also your understanding of the intent
6 of NMMF?

7 A Yes, I understand that.

8 Q All right. So, we can perhaps get that
9 clarified with respect to Mr. Van Dam's earlier
10 testimony when he resumed -- resumes the stand later.

11 Going over to Page 10 in the same discussion,
12 you see a paragraph that begins "Another part of the
13 amendment being proposed would eliminate the pooled
14 supply provisions", and then later in that paragraph,
15 there's a sentence that says -- that -- a sentence
16 following the discussion of how "supply plants outside
17 the Order be used to qualify milk under Order 124 could
18 no longer be the case", you then stated, "Instead, milk
19 must move inside the marketing area to a pooled
20 manufacturing plant."

21 Would it also be true that it could be moved
22 inside the marketing area to a pooled distributing
23 plant as well?

24 A Yes.

25 Q And was that the intention of NDA, to the

1 best of your knowledge --

2 A Yes, sir.

3 Q -- in supporting -- in supporting these
4 proposals?

5 A Yes.

6 Q And is it your understanding that that was
7 also NMMF's intent?

8 A That's my understanding.

9 MR. MARSHALL: Your Honor, I have no further
10 questions of this witness at this time.

11 JUDGE HUNT: Mr. Berde?

12 CROSS EXAMINATION

13 BY MR. BERDE:

14 Q On Page 10 of -- on Page 10 of your
15 testimony, Mr. McBride, you propose a modification of
16 the language as it now is drafted with respect to milk
17 diverted to non-pooled plants by the addition of the
18 following language: "and cooperative pooled
19 manufacturing plants", etc.

20 If that milk went into a pooled plant, it
21 would go in as producer milk, would it not?

22 A It would.

23 Q And if that cooperative manufacturing plant
24 had moved milk for Class 1 purposes to a distributing
25 plant, it would be reflected in the reports of the

1 manufacturing plant as a Class 1 disposition, would it
2 not?

3 A It would show up as a movement to a pooled
4 distributing plant.

5 Q Yeah. So, wouldn't that plant be accountable
6 pro rata on all of its usage differently than the milk
7 that was diverted to a non-pooled plant?

8 A I don't quite understand the question.

9 Q Well, it would have a series -- if -- if some
10 of the milk went into the market for Class 1 purposes,
11 maybe Class 2 purposes, the remainder manufactured for
12 Class 3 or 4 usage, the accountability of that plant to
13 the pool would reflect all of the uses in that
14 manufacturing plant, would it not?

15 A It would.

16 Q Which would be different than the value of
17 that milk that is diverted to a non-pooled plant?

18 A The co-op manufacturing plant, the
19 definition, 20 percent of the milk of the co-op must go
20 to a pooled distributing plant to qualify as a pooled
21 manufacturing plant.

22 Q All right. But that would not be diverted
23 milk? That would not be defined as diverted milk, if
24 it was -- it was milk that moved as part of the
25 performance requirements of that plant?

1 A It would not be considered diversions of the
2 non-pooled plant.

3 Q Does the addition of your language complicate
4 the objective that is contemplated by the provision
5 that you're attempting to modify?

6 A The intent was that diversions, 80-percent
7 diversions should also include milk to non-pooled
8 plants as well as milk to cooperative manufacturing
9 plants.

10 Q I understand what you're trying to
11 accomplish, but is the -- is the diversion language
12 inconsistent with the concept of moving milk to a
13 pooled plant?

14 A Diversion language --

15 Q The language that we referred to as
16 diversion, is that incompatible with the concept of
17 milk that was moved to a pooled plant? By definition,
18 that is not a diversion, is it?

19 A That is correct. If others were putting milk
20 into a designated co-op supply plant, that also would
21 not be considered a diversion and would just be milk.
22 The intent is if the milk is going to a co-op
23 manufacturing plant, that it be included as part of the
24 diversion calculation.

25 Q So, you -- you -- you want to -- you want the

1 Secretary to consider that milk as if it were diverted
2 milk?

3 A Yes.

4 Q In terms of the -- in terms of the 80-percent
5 limitation?

6 A Yes.

7 Q Then directing your attention down to the --
8 toward the bottom of that page with the paragraph that
9 begins under "Present provisions", etc., on Page 10.

10 A Yes.

11 Q Under -- do you see that?

12 A Yes.

13 Q "Milk could be pooled using the pooled supply
14 plant as long as 20 percent of the milk was delivered
15 to the market's pooled plants." Shouldn't that be
16 pooled distributing plants?

17 A That's the intention.

18 Q Isn't that correct?

19 A Yes.

20 Q Yeah. Okay.

21 MR. BERDE: I -- I would simply want the
22 record to reflect, Your Honor, that we would support
23 the language that is proposed and designed to limit
24 what we have referred to as the "double dipping" as it
25 appears on Page 11 or such other language as the

1 Secretary believes to be more appropriate to accomplish
2 the same purpose, either by the adoption of the
3 language that appears in Page 11 or by the modification
4 of the existing dairy farmer for other markets
5 provision.

6 JUDGE HUNT: Yes, Mr. English.

7 MR. ENGLISH: Charles English.

8 CROSS EXAMINATION

9 BY MR. ENGLISH:

10 Q Mr. McBride, let me follow up on that
11 immediate discussion. Your intention, I believe, is,
12 as Mr. Berde stated, to deal with the double pooling,
13 correct?

14 A Yes.

15 Q You do not object, I take it, to a producer
16 being allowed to choose one pool or another, whether it
17 is a federal pool or a state pool, with a marketwide
18 pooling of returns, correct?

19 A Correct.

20 Q And therefore, the intention of your proposal
21 and the design you expect not to be geographically
22 limiting so much as providing clearly the dairy farmer
23 a choice between one market or another, correct?

24 A Yes.

25 Q Okay. And in fact, the language you've

1 chosen to use to identify the kind of issue has been
2 defined by the Department before in 1000.76(c) and even
3 before Federal Order Reform, the Great Basin, with
4 respect to that milk which is subject to a state order
5 with a marketwide pool, correct? To your knowledge,
6 that language actually already exists or a version of
7 it exists in the Federal Orders to define that kind of
8 milk?

9 A I'm not aware of it.

10 Q Nice try. I'll ask Elvin then.

11 Let me -- let me just play with the language
12 a little bit because I -- I am very sympathetic, and I
13 just want to make sure we're doing the right thing.

14 You have, in addition, no milk of a dairy
15 farmer shall be eligible for diversion if any portion
16 of that milk is pooled under state order with
17 marketwide pooling.

18 If a producer has 50 percent of its milk
19 delivered to a pooled distributing plant in the Pacific
20 Northwest, that milk is fine under this provision,
21 correct, and it's eligible to be received -- treated as
22 received, correct?

23 A Fifty percent of his milk --

24 Q Is literally received at a pooled
25 distributing plant located in Salem, Oregon, --

1 A Right.

2 Q -- whatever happens -- and then let's say
3 that other 50 percent of the milk was moved to a non-
4 pooled plant in California or Montana, that 50 percent
5 of the milk, you're saying that's fine. You're not
6 cutting out that 50 percent of the milk. It can still
7 receive the full price, correct? You haven't written
8 language to prevent that?

9 A As long as the other 50 percent is still part
10 of the Pacific Northwest Federal Order.

11 Q I understand, but I don't read this language
12 as saying that the other 50 percent may be ineligible
13 for diversion, but the first 50 percent that's actually
14 received, you're prepared to be pooled, correct?

15 A Yes.

16 Q Okay. Now, let's say of the remaining 50
17 percent, half of it was diverted, say, to your plant in
18 Sunnyside, and half of it went to Montana or to
19 California, to a plant regulated by a market order.

20 As I read your language, no diversions at all
21 of that milk are permitted because more than one pound
22 or a pound or more of milk has been diverted to a plant
23 pooled -- that has been pooled under a state order,
24 correct?

25 I guess what I'm getting at is, have you

1 perhaps in dealing with this been maybe broader than
2 even those who have proposed limiting this issue in
3 other Orders been, and would it still carry out your
4 spirit to write the provision as follows: In addition,
5 the milk of a dairy farmer that is pooled under a state
6 order with a marketwide pool shall be ineligible for
7 diversion?

8 That is to say, only prevent diversion of
9 that milk which is actually pooled on one of those
10 state market orders as opposed to any milk that is
11 diverted, even if some of that milk is diverted to a
12 non-pooled plant on the Pacific Northwest?

13 A I'd have to think about that.

14 Q Okay. That's fine. This is the kind of
15 issue that can be addressed on brief, and I wanted to
16 raise it now because I'm just trying to be consistent
17 as you talk about a national policy. I thought that
18 maybe we'd look at what we've tried to do elsewhere and
19 at least Proponents and other Orders have only tried to
20 exclude pooling of the same milk twice, and I think
21 that's the intent of what you're trying to get at, and
22 -- and if so, perhaps a little tweaking of the language
23 could work, and I'd ask if you'd consider
24 that.

25 A Thank you.

1 JUDGE HUNT: Do you have any questions, Mr.
2 Cooper?

3 MR. COOPER: Yeah.

4 CROSS EXAMINATION

5 BY MR. COOPER:

6 Q Mr. McBride, for years, I've heard your
7 counsel saying that all Pacific Northwest revolves
8 around what California does, too. So, I assume since
9 you've been here for the last 15 years, working with
10 this firm, this co-op, you must know what California
11 does.

12 As I understand it, and correct me if I'm
13 wrong, milk that goes directly from farms in California
14 and lands in Order 124 is not pooled in California, is
15 that correct?

16 A The traditional milk?

17 Q Excuse me?

18 A The current milk?

19 Q Any milk that is -- goes from farms in
20 California directly to plants in Order 124 is not
21 pooled in the California -- under the California State
22 Order? It's only milk that goes to California state
23 plants that's pooled under the California State Order,
24 is that correct?

25 A Yes.

1 Q Okay. So, -- and as far as you know, the --
2 the -- I think it's about one percent of the Order milk
3 from 124 comes from California? Some real low
4 percentage like that?

5 A Yes.

6 Q And it's actually gone down in the last year
7 from the year before, I believe the Marketing Order
8 statistics will show that, is that also correct?

9 A Yes.

10 Q Okay. To your knowledge, has any of that
11 milk been moved on the California Order or is that all
12 farm milk that goes straight to Order 124 plants?

13 A Speaking of the five NDA shippers, that milk
14 is -- goes in to the 124 Order.

15 Q Excuse me. I couldn't hear you.

16 A For the NDA producers in Northern California,
17 that milk is pooled only on the Pacific Northwest
18 Order.

19 Q Okay. So, it's farm milk that goes from
20 California farms rather than going through the
21 California State pooled plants?

22 A Yes.

23 Q Okay. So, you haven't had any -- this Order
24 hasn't had any problem with milk pooled on California
25 state plants and also being pooled here?

1 A We have not had the traditional California
2 milk being pooled in both Federal Orders and the --

3 Q You haven't had the California -- milk that's
4 pooled under California State Order being pooled here,
5 also?

6 A No.

7 Q And does it appear that the 80-percent
8 diversion limitation, plus the six-day delivery, would
9 keep that from occurring in the future?

10 A No.

11 Q Excuse me?

12 A No.

13 Q No. You think that wouldn't be enough to
14 keep it off?

15 A We've not had that situation occur in this
16 Order, you know, to this point. It doesn't mean it
17 couldn't happen.

18 Q Why hasn't it occurred, in your opinion?

19 A You'd have to ask the producers. They're the
20 people that have to produce it in California.

21 Q So, you have no idea why milk hasn't been
22 attached to this Order -- from California pooled milk
23 hasn't been?

24 A No.

25 Q And you think the 80-percent diversion

1 limitation, plus the six-day delivery, would be enough
2 to keep Southern Idaho or Utah milk from being attached
3 to this Order, is that correct?

4 A It would -- you know, we aren't -- if they
5 wanted to bring it in from Utah, that's fine, but it
6 would just show attachment to the -- to the market
7 similar to what we've had --

8 Q I mean, milk not serving this Order, that
9 would be enough to keep that off the 80 percent and the
10 six day?

11 A It would be a disincentive.

12 Q I mean, do you think that's enough to take
13 care of the Southern Idaho and Utah milk?

14 A We would hope that it'd be enough.

15 Q Is there a reason it wouldn't be enough for
16 California pooled milk?

17 A No. That would be a reasonable number. That
18 wouldn't keep -- that wouldn't keep California out.

19 MR. COOPER: I guess you can raise it at this
20 point or anywhere along the way, Your Honor, but I -- I
21 think, you know, speaking for myself and, I think, for
22 the Department here, there is a motion here to include
23 a proposal concerning California milk, and while this
24 proposal is similar to those that have been noticed and
25 heard in hearings formally held earlier this year in

1 Minneapolis and in Cleveland and in -- I don't think we
2 did do Kansas City for California milk, no such
3 proposal was submitted here by September 4th when we
4 had the proposals closed for the hearing on this.

5 That was long after the Minneapolis hearing
6 was held, in fact in June, where there was a debate for
7 days about the California double dipping. Mr. Van Dam
8 was there. I don't recall seeing Mr. McBride there.
9 Were you?

10 THE WITNESS: I was not.

11 MR. COOPER: Okay. But, you know, even after
12 that hearing and all that debate, nobody came in and
13 offered any proposal in this hearing to deal with this
14 double dipping, whether it be through farmers from
15 other markets or through direct double dipping
16 provision like was heard in Minneapolis and in Kansas
17 City, and it would appear that this is outside of the
18 scope of this hearing, and it would also appear,
19 although it perhaps is beyond the question of outside
20 the scope of the hearing, that there has been no
21 problems so far, and there doesn't appear to be any
22 reason to see a problem in the testimony given here.

23 But I -- I guess the main point is there's --
24 this hearing, as stated in the Hearing Notice, is to
25 consider proposals that are included in the Hearing

1 Notice, the appropriate modifications thereof.

2 JUDGE HUNT: The modification.

3 MR. COOPER: If we're talking about a
4 diversion limit of 75 percent or 90 percent, that's
5 fine. If we're talking about -- that was published
6 here. If somebody wants to tweak it, that's fine.

7 We also talked here in the Hearing Notice
8 about a six-day touch-base provision and that was
9 something that was noticed by the Secretary. Now, if
10 somebody wants to come in and start tweaking whether
11 we're doing five days or eight days, hey, that's fine,
12 too.

13 But to get into an area that was, you know,
14 specifically before everybody and everybody knew about
15 it, nobody proposed, now we're coming in here at the
16 hearing and proposing, I don't think it's an
17 appropriate modification of the Hearing Notice, and I
18 would object to any consideration of the proposal,
19 either to change the dairy farmer for other markets
20 provision or to direct double dipping for both
21 proposals, such as was heard in Minneapolis and Kansas
22 City, for the Upper Midwest and the Central Orders.

23 MR. MARSHALL: May I speak, Your Honor?

24 JUDGE HUNT: Mr. Marshall?

25 MR. MARSHALL: First, I would agree with Mr.

1 Cooper that the question is whether or not this is an
2 appropriate modification of the language proposed to be
3 modified in the Notice of Hearing.

4 He raises, in addition to that, sort of a
5 Lashes argument, a delay argument, suggesting that the
6 language of the Hearing Notice could have been altered
7 to be consistent with the Hearing Notices in other
8 Order proceedings, and we could have -- Mr. Van Dam, in
9 his testimony, indicated that he was aware of the issue
10 at the time of the earlier hearing, and he also said
11 that he was under the misimpression that the language
12 of the Order would already have prohibited that.

13 Now, solely with respect to the question of
14 whether we were delaying and should be held, I guess,
15 accountable for not timely submitting a more specific
16 proposal at the time of the hearing, I would like to
17 quote from the language of the Final Decision in which
18 the present Order language was prepared.

19 In which particular respect to something
20 known as the "dairy farmer for other markets
21 provision", the Department wrote as follows:
22 "Producers subject to other state programs should not
23 be allowed to pool the reserve supplies from the state-
24 regulated markets and pool it in returns" -- correction
25 -- "and share in returns from the Pacific Northwest

1 pool while enjoying the benefits of the State Order's
2 Class 1 returns."

3 Now, it had been our impression, and I
4 suggest that for good reason, that the dairy farmer for
5 other markets provision would have applied to the
6 traditional double dipping situation. What we have
7 found in preparing for this hearing is that the Local
8 Administrator's Office believes that that language I
9 just read to you applies only in the situation where
10 part of the milk is pooled in California and the other
11 part might be pooled in the Pacific Northwest.

12 Mr. Cooper suggests in his questioning to Mr.
13 McBride that there hasn't been a problem, and if we'd
14 like to explore that issue, if it's relevant to the
15 question of -- of the objection, that NDA, Mr. McBride,
16 could have pooled milk from our existing California
17 producers on the California pool, I believe, because
18 they do at times have their milk delivered to
19 California plants.

20 But I submit to you that all that is really
21 to explain what the background is behind the proposal,
22 and that the real question is whether or not the
23 Hearing Notice is sufficient to suggest this as an
24 appropriate modification covered within the scope of
25 the Hearing Notice.

1 I suggest that it is, and I make two
2 arguments in support of that. Number 1. The whole
3 purpose of this hearing, as everybody in the industry
4 recognizes, is to deal with the pooling of out-of-area
5 milk, and I suggest that everyone realizes that
6 California is out of area.

7 Therefore, the question of pooling California
8 milk is clearly within the scope of the hearing
9 proposals as proposed and that dealing with the smaller
10 question of whether milk can be simultaneously pooled
11 on both Orders is a relatively small feature of that
12 larger purpose of the hearing.

13 Secondly, I suggest that because we are
14 amending, proposing to amend or suggesting to the
15 Department that they amend a provision that would be
16 added to the Order only if -- only as a result of this
17 hearing, in other words, it's new language to the
18 Order, because of that, people are on notice that that
19 particular provision may be modified at the hearing and
20 therefore have the concern about the inclusion of this
21 more specific language about diversion being added to
22 the new provision about diversion, they well have shown
23 up for this hearing. In fact, they may have shown up
24 for this hearing.

25 So, I suggest that it is within the scope of

1 the Hearing Notice. That's the reason why the
2 objection should be overturned, and I've provided some
3 additional background to suggest why it wasn't put into
4 the Hearing Notice originally in a more specific way.

5 Thank you, Your Honor.

6 JUDGE HUNT: Anyone else wish to make comment
7 on this? Mr. Beshore?

8 MR. BESHORE: I don't take a specific
9 position one way or the other on the issue, but I want
10 the record to reflect that this information in
11 consideration of that, the "double dipping issue"
12 that's been debated specifically in two prior hearings
13 relating to Orders 30 and Order 32, at which it was
14 expressly noticed the particular -- the suggested
15 manner of dealing with California milk was specifically
16 noticed in those hearings, and DFA has taken a position
17 consistent in those hearings and would in this hearing,
18 if it was part of the hearing, that there is a
19 principal way to deal with the California problem than
20 is different than that suggested by some of the
21 Proponents of those hearings and suggested by the
22 language that's -- that's been adduced here.

23 We did not place our proposed fix for the
24 California double dipping problem in the Hearing Notice
25 because we did not understand it to be part of the --

1 of the hearing, but DFA in these other hearings has
2 taken -- has had a position with respect to how to
3 address that problem, and we would certainly want to be
4 able to advance that position at this hearing, if it
5 becomes part of the proceeding.

6 JUDGE HUNT: Mr. Berde?

7 MR. BERDE: Your Honor, I was going to
8 suggest specific language to be added to an existing
9 provision of the Order which I believe should be
10 accepted as a modification in the Notice of Hearing as
11 being one that is appropriate for consideration at this
12 hearing, and I'm going to -- I'm going to read this
13 suggested language, so that it becomes part of the
14 record, and argue that it should be considered by the
15 Secretary in view of all of the testimony that has
16 already been submitted concerning the -- the
17 possibility that double dipping with respect to
18 California milk may occur in this Order.

19 The language is as follows, that there should
20 be added to Section 1124.12, Paragraph A, Subparagraph
21 5, which is referred to as the Dairy Farmer For Other
22 Markets Provision, the following language after the
23 word "markets; "provided further that a dairy farmer
24 who delivers any part of his production during the
25 month to a plant in a state with a marketwide pooling

1 system shall not be a producer in this Order."

2 I think that's an appropriate modification
3 that would accomplish what everyone has been concerned
4 about at this hearing, and we'd submit in our view,
5 it's simply a clarification of what the dairy farmer
6 for other markets provision is intended to accomplish
7 and apparently is the belief of many that there's a
8 loophole in it which would overcome what is the intent
9 of that provision.

10 MR. YALE: May I be heard for the record?

11 JUDGE HUNT: Yes.

12 MR. YALE: Ben Yale. I want to concur with
13 Mr. Berde. This is, I think, clearly within the scope
14 of this hearing.

15 I just want to note that the -- that the
16 summary that came out with the Notice of the Rule talks
17 about eliminating certain supply plant qualification
18 standards that allow, you know, different, you know,
19 direct milk from farms to pooled distributing plants,
20 prohibiting a pooled plant operator from including milk
21 diverted to pooled distributing is a qualifying
22 shipment for pooling and so on and so forth.

23 I mean, anybody who understands the industry
24 and marketing of milk and the qualification of the
25 Federal Order Program and has read this summary would

1 have no doubt in their mind that what was at issue was
2 who -- what producer's milk is going to be able to
3 participate in that pool, period, and further, it's --
4 it's of notice in here is it identified the sections
5 that are specifically going to be modified.

6 It is 1124.7 which is the pooled plant. It's
7 11.24 which is producer milk. 13 -- what did I say?
8 13. 1124.13, the producer milk provision.

9 So, anybody who read this Notice knows that
10 those two issues are up for grabs, and historically,
11 historically, the Department has listened to testimony,
12 and the proposals aren't voted on. They aren't taken.

13 It's not like baseball arbitration. It's either all
14 or nothing. I mean, they're melded during the hearing.

15 They're -- they're revised even in the recommended
16 decision, and this issue, I think everybody is on
17 notice, that the producer milk definition and the
18 standards and whether it's this provision that -- that
19 NDA has proposed or the one that DFA proposes, that's
20 up for the Department and the Secretary in her wisdom
21 to decide.

22 But this hearing was called to decide to
23 bring that evidence to show that we got a problem in
24 this Order, we need to fix it, and we're going to
25 address it by the pooled plant definition and the

1 producer milk definitions, and these are addressed to
2 that issue. So, we would say that it should be part of
3 it.

4 MR. BERDE: May I add one more point, Your
5 Honor?

6 JUDGE HUNT: Very briefly.

7 MR. BERDE: Furthermore, I find it odd that
8 the Secretary's representatives should object to a
9 proposal which is supported by all of the producers for
10 whose benefit we're here and for whose benefit the
11 whole system exists, and if nobody objects, I can't
12 understand who is harmed by the modification that we
13 proposed, and who could complain for lack of notice?

14 JUDGE HUNT: Well, the Secretary does define
15 -- the Secretary's discretion is to -- is again to
16 define the scope of the hearing. That's clearly the
17 Secretary's determination, regardless of what the
18 parties may wish. The Secretary does define the scope.

19 Mr. Beshore? I'm not necessarily -- I've
20 made no ruling yet. Mr. Beshore?

21 MR. BESHORE: DFA is among those producers,
22 and we are not supporting the modified proposal,
23 purported modified proposal that's not in the Hearing
24 Notice. I mean, that's, you know, a remedy for a
25 problem that has -- that -- that we have disagreed with

1 at other hearings and would need to disagree with here,
2 and we are among the producers that Mr. Berde refers
3 to, and it wasn't part of the proposal that -- that we
4 were here for.

5 JUDGE HUNT: Mr. Cooper?

6 MR. COOPER: I guess from our standpoint,
7 it's not so much exactly which provision, whether it's
8 in 12 or 13, I mean, we've noticed .7, we've noticed
9 .13, but even if it was in .12, I mean, we change other
10 provisions of Orders based upon testimony. We're not
11 locked into we're only going to consider .7 and .13,
12 and I agree. It is a pooling issue, and there's no
13 doubt it's a pooling issue, and I also -- you know,
14 from our standpoint, I certainly can't speak for the
15 Secretary, but I've got no reason to believe that if
16 these people had submitted this issue, it wouldn't have
17 been noticed here.

18 It was noticed in two of the other three
19 Orders. The two were submitted. The Upper Midwest and
20 the Central Marketing Order. I guess my problem is
21 more from the process. We've had two other Marketing
22 Orders, the Upper Midwest and the Central, where people
23 sent in specific proposals addressing double dipping,
24 no matter how it was done, whether it was done in --
25 well, it wasn't done with farmers in other markets. It

1 was done as a direct double dipping proposal.

2 But -- and when the Hearing Notice went out
3 to the public and to all interested persons, it
4 included the type of proposals Mr. Berde has here and
5 as well as a double dipping proposal, you know,
6 diversion limit proposals as well as double dipping
7 proposals.

8 One of them, I even believe, wanted to change
9 the touch-base to two days instead of one day. I can't
10 recall all the details. They get fuzzy after awhile
11 when you go from hearing to hearing, and it's simply
12 procedural. It's a posture that bothers me a bit here
13 in that we have this, you know, coming in at this
14 point.

15 Now, people say there's no objection,
16 although Mr. Beshore has his spin on his objection, and
17 he's here and obviously could address his objections.
18 He's been a Proponent in the other three hearings.
19 He's got it down cold.

20 In fact, the testimony that was passed here
21 says December 4th, 2001, Kansas City, Missouri.

22 JUDGE HUNT: I'm going to rule that for
23 purposes of this hearing, I'll allow testimony on this
24 California issue about pooling. My ruling does not
25 bind the Secretary. I do not make a decision. I'm

1 allowing this just for making a record.

2 If the Secretary in the -- in -- in reviewing
3 this record decides that she did not intend to cover
4 this, she can say so in her ruling. So, this in no way
5 binds the Secretary, but in the event the Secretary
6 does decide that it may be relevant, it may be a
7 pertinent modification of -- of the hearing today, I'll
8 allow it for that purpose.

9 So, I will allow the -- the testimony that's
10 been presented and anything that you wish to present on
11 that point.

12 MR. COOPER: Thank you, Your Honor.

13 JUDGE HUNT: Yes, Mr. English?

14 MR. ENGLISH: May I just suggest on the
15 record that if the Secretary determines that -- that
16 more notice was required, a solution might be, without
17 reopening this entire hearing, to reopen this
18 proceeding under a new Notice for that part and that
19 could very well be tied to another hearing which I
20 think is expected to be had in the future regarding
21 this Market Administrator.

22 So, I would just suggest that the Secretary,
23 if she continues to have those concerns, could address
24 this if that's where she wants to go with it.

25 JUDGE HUNT: Thank you. Mr. Beshore?

1 MR. BESHORE: I think Mr. English's point is
2 well-taken, and it would be particularly helpful from
3 DFA's perspective which, as a national organization,
4 has advocated some principled approaches to these
5 problems on a systemwide basis, on a national basis,
6 and we want to continue to be able to advocate those
7 kinds of resolutions in every Order, and we're hampered
8 in this one alone because it was not part of the agenda
9 that we foresaw for the proceeding.

10 JUDGE HUNT: Well, that's my reason for my
11 ruling allowing it in. I would not want the Secretary
12 to say, well, it should have been -- had testimony on
13 this point and have a hearing just for that purpose and
14 have to go through the expense of doing that. So,
15 that's another reason for allowing it. But again, that
16 in no way binds the Secretary in what she wants to
17 decide.

18 Any further questions of -- of Mr. McBride?
19 Yes, Mr. Tosi?

20 CROSS EXAMINATION

21 BY MR. TOSI:

22 Q I have several questions to ask you, Mr.
23 McBride. Would you agree that the pooling matters of
24 an Order exist to decide which producers, which milk
25 and which handlers share in the revenue that's accrues

1 from the classified pricing of milk in the Order?

2 A That's an ability of pooling standards.

3 Q I'm sorry. I didn't hear you.

4 A That's the ability of pooling standards, to
5 determine which producers and handlers --

6 Q That's one of its functions?

7 A Yes.

8 Q Okay. Would you also agree that one of the
9 functions of the pooling standards is to make sure that
10 the market's adequately supplied with milk from Class
11 1?

12 A Yes.

13 Q Would you be able to -- of the opinion that
14 for the most part, it's the additional revenue that
15 comes from Class 1 use of milk that adds additional
16 value to the markets pooled above manufacturing uses?

17 A Yes.

18 Q And then, you would agree then that because
19 the additional revenue is coming from Class 1 sales,
20 that the producer's ability to service that market
21 should become the key criteria for determining at the
22 end of a month how all milk was used to determine which
23 producers, which milk of the producers and which
24 handlers sit down at the table to divide up the -- the
25 revenue that's in the pool?

1 A Are you saying that those producers that
2 supply the Class 1 markets should be able to, you know,
3 be the ones participating in the sharing of the pool?

4 Q Yes, that's my question.

5 A I'd agree.

6 Q Okay. And you -- and I take it then that
7 you're of the opinion that the milk that's -- that's
8 currently being pooled from Southern Idaho and -- and
9 from certain parts of Utah are not performing that --
10 are not meeting those standards for deciding if that
11 milk should be -- should share in the Class 1 revenue
12 in the pool?

13 A Yes.

14 Q Okay. I'm a little confused in that earlier
15 this year, the Market Administrator reduced the
16 diversion limits to 80 percent.

17 A Yes.

18 Q Okay. And some of the testimony, I think it
19 was yours, also, perhaps it was Mr. Van Dam's, in that
20 the reduction in the diversion limits alone has not
21 done much to stem the association of this milk that's
22 not really servicing the Class 1 needs of the market
23 from being pooled here.

24 A It has -- the reduction in diversion limits
25 has limited the amount of milk that can be pool-loaded

1 from other areas.

2 Q And that if it had not been reduced, you were
3 of the opinion that it would have been -- the situation
4 would be much worse than what's currently being
5 exhibited through what's being reported?

6 A There would have been the ability to almost
7 have unlimited diversions of milk, additional milk on
8 the Pacific Northwest Order.

9 Q Okay. So, to the extent that there's still
10 additional milk that -- that perhaps is not properly
11 associated with the Order and therefore maybe should
12 not be part of the pool-sharing of the additional
13 revenue that comes from these Class 1 sales, how is
14 that being accomplished right now? How is that milk
15 from Southern Idaho and Utah able to pool on the
16 Pacific Northwest Order?

17 A They are able to pool milk on this Order
18 based on the Class 1 sales that they currently have in
19 the Pacific Northwest Order. In fact, for every pound
20 of milk that you have for Class 1, you pool or divert
21 an additional four pounds to non-pooled plants.

22 Q And could you give an example just to clarify
23 that? I'm a difficult time understanding how it is
24 that a distant supply of milk is -- is somehow
25 supplying the Class 1 needs of the market, and then in

1 effect what we're saying here is that it's not really a
2 part of the market.

3 A The distant supply of milk is not supplied in
4 the Class 1 market.

5 Q I'm sorry. I -- I guess because of the noise
6 from next door over here, I'm having a difficult time
7 hearing you.

8 A Okay. The distant supply of milk is not
9 supplied in the Class 1 market. There is milk
10 currently in the market that's, you know, being
11 supplied to Class 1 that allows a handler to divert
12 additional milk from distant areas.

13 Q So, the distant milk, for example, is -- is
14 attaching itself to the market by being reported, say,
15 on a distributing plant's monthly report to the Market
16 Administrator as diverted?

17 A Yes. It's not only the distributing plants,
18 I would assume, but I don't know that for sure. But it
19 is being reported, you know, as producer milk on the
20 Pacific Northwest Order.

21 Q Okay. One of the other reasons that -- that
22 we're here, in addition to considering these proposals,
23 is to determine whether or not emergency conditions
24 exist for moving directly to a final decision and
25 making a recommended decision.

1 Do you concur with that emergency need?

2 A Yes, I do.

3 Q Also with regard to in certain parts of your
4 statement, -- let me find it. One moment. On Page 6.

5 A Okay.

6 Q I know that in one way, going into the pros
7 and cons of the outcome of -- of how the Department
8 handled the Class 1 price structure is certainly beyond
9 the scope of the hearing, and I really don't want to go
10 there, but in your paragraph there on Page 6, where
11 you're talking about reform, "a new theory of Class 1
12 location value was established", --

13 A Yes.

14 Q -- you seem to emphasize there, "depending on
15 the pool to which it is attached". Would you agree
16 that the pooling standards in Part 5, where such
17 standards by which we can determine which milk that's
18 going to be pooled, where it will attach?

19 A Not necessarily. It's going to depend, you
20 know, more on price.

21 Q Okay. A hypothetical example. If milk in
22 Utah is worth \$11 a hundredweight and milk in Seattle
23 is -- or here in the Pacific Northwest is worth, say,
24 \$12, and you're a producer down in Utah, and you'd like
25 to be able to share in this \$12 price up here, value

1 being what it is, wouldn't you think that the most
2 germane issue then for how that producer shares in the
3 \$12 of the Pacific Northwest be the criteria or the
4 standards that producer would have to meet to allow his
5 milk to be priced in the Pacific Northwest?

6 A If you're saying that there needs to be
7 standards that that producer needs to meet to associate
8 his milk with the Pacific Northwest Order or by, you
9 know, moving milk into the market and servicing the --
10 ability to service the Class 1 plants, then yes.

11 Q Would you also agree that if pooling
12 standards are -- the pooling standards for an Order are
13 perhaps not appropriate, perhaps do not adequately
14 define which producers, which milk, and which handlers
15 should share in the revenue in that market's pool, that
16 to the extent that that's inadequate, can you end up
17 with interesting or unusual outcomes with respect to
18 where people decide to pool to take advantage of
19 resulting price relationships that are the result of
20 pooling, the pooling process itself?

21 A The pooling process is an administrative, you
22 know, determination of where you're going to pool the
23 milk that, I think, you know, pricing will determine
24 where you want -- where you may want to pool, you know,
25 the milk.

1 Q But the questions that I'm asking, I'm trying
2 to get at a way to make a clear distinction between a
3 lot of the testimony here, including yours, that
4 focuses on pricing distribution as a part excepted from
5 pooling issues.

6 A Okay.

7 Q And let me start over here a little bit.

8 A Milk value being what it is, --

9 JUDGE HUNT: Maybe we could take a break now,
10 and we can come back and resume this after lunch, if
11 that's not interrupting too much here.

12 MR. TOSI: No, sir.

13 JUDGE HUNT: The questioning? All right.
14 Let's be back here at 1:30.

15 (Whereupon, at 12:15 p.m., the hearing was
16 recessed, to reconvene this same day, Tuesday, December
17 4th, 2001, at 1:30 p.m.)

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1 Q Okay. Thank you.

2 MR. TOSI: I have no other questions, Your
3 Honor. Thank you. Thank you, Mr. McBride.

4 JUDGE HUNT: Any other questions of Mr.
5 McBride? Yes, Mr. Beshore.

6 CROSS EXAMINATION

7 BY MR. BESHORE:

8 Q Mr. McBride, on the -- on the first page of
9 your testimony, the paragraph begins, "NDA is a member
10 of the Northwest Milk Marketing Federation". In that
11 paragraph, you state your initial objection as a
12 principled objection or a theoretical objection to what
13 you call "artificial pooling of milk". Do you see that
14 paragraph?

15 A Yes.

16 Q Okay. Would I understand from that paragraph
17 that it's your concept that milk which serves the
18 market regularly should receive an economic reward for
19 serving the market blend price which is not available
20 and should not be available to milk which is not
21 serving the market on the regular basis?

22 A Yes.

23 Q Now, you refer at Page 3 and Page 7, I think,
24 a couple of places, to milk in the Caldwell, Idaho,
25 area or in -- in Idaho, and I just want to -- want to

1 understand the economics of that transaction a little
2 bit.

3 Does -- does Northwest Dairymen's Association
4 have a supply of milk in or around Caldwell, Idaho, or
5 -- or Jerome, Idaho, I guess?

6 A Yes, we do.

7 Q Okay. That milk is pooled on what Order?
8 Order 135?

9 A Yes.

10 Q Which is the Western Order?

11 A Correct.

12 Q Okay. But the milk -- a portion of the milk
13 is delivered and processed at a West Farms Foods plant
14 or plants in this marketing area, correct?

15 A The milk is received -- there is milk
16 received at a Jerome -- at our West Farm Jerome
17 facility, condensed, and some of that condensed comes
18 over into this market.

19 Q And is then processed for what products?

20 A Processed into, for the most part, cheese --
21 I mean, some of the cheese but mostly butterfat.

22 Q But all of the milk's pooled on the Western
23 Order?

24 A Correct.

25 Q Now, on -- on the third page of your

1 testimony, you had -- you noted, the first full
2 paragraph at the top, that under the prior Orders, milk
3 in the Caldwell -- by the way, are Caldwell and Jerome
4 in the same general area in Idaho?

5 A They're about a hundred miles difference.
6 Caldwell's in the Boise area, Jerome's near the Magic
7 Valley down by Twin Falls.

8 Q Okay. Was the pricing applicable to milk
9 delivered at those locations roughly equivalent under
10 the pre-Reform Pacific Northwestern Order before 19 --
11 before January 1, 2000?

12 A Current prices and prior to?

13 Q Well, prior to. Prior to -- you said prior
14 to -- on Page 3, you said, "Prior to current Order",
15 there was a minor 55-and-a-half cent location
16 adjustment under the Pacific Northwest Order on milk
17 delivered in that area, Caldwell, Idaho.

18 A Correct.

19 Q Would it have been about the same to Jerome?

20 A It would have been more because it's based on
21 miles.

22 Q Okay. Greater reduction from the base price
23 of the Pacific Northwest Order?

24 A Yes.

25 Q Okay. Now, under the present Order, milk in

1 that region, if it's pooled under the Pacific Northwest
2 Order, is subject to a minus 30-cent location
3 adjustment, correct?

4 A Yes.

5 Q Now, is it your -- is it your position that
6 it's presently economically advantageous to pool milk
7 in that area on an artificial basis on the Pacific
8 Northwest Order at minus 30?

9 A Many times, it has.

10 Q Okay. Have -- has Northwest Dairymen pooled
11 its milk in that area on the Pacific Northwest Order
12 when it has been economically advantageous to do so?

13 A No, we have not.

14 Q And why is that?

15 A Basically, we leave that milk on the -- on
16 the Western Order.

17 Q Wouldn't you try to pool it where it would
18 get the greatest return for your members?

19 A You are going -- you know, you are going to
20 try to, you know, enhance the value of producers on the
21 association. Our -- our decision was to put the milk
22 under the Western Order.

23 Q Okay. Does -- I wonder if there's a part of
24 that equation that hasn't been -- we haven't discussed
25 yet in this hearing, and that is, what the pooling

1 handlers' market share is on the two Orders. Would
2 that go into the equation?

3 A Well, that would be part. That would be part
4 of the decision.

5 Q So, for Northwest Dairymen, your -- what is
6 your approximate share on the Pacific Northwest Order?

7 A Sixty-five percent.

8 Q Okay. And what is it approximately on the
9 Western Order?

10 A Western Order is probably -- of milk pooled,
11 it would be about 10-15-20 percent, maybe.

12 Q Would those relative percentages enter into
13 that decision on where to pool the milk?

14 A It could be part of the decision.

15 Q Okay. Because of the fact that if you're
16 pooling, adding milk to the Order, the Pacific
17 Northwest Order pool, you're drawing money -- you're
18 already drawing -- two-thirds of the money, 65 percent
19 of the money, you're already drawing out of the pool
20 anyway, correct?

21 A Yes.

22 Q So, you'd only have a net benefit on perhaps
23 the 35 -- 35 percent of the marginal difference,
24 correct?

25 A Okay.

1 Q Did that help make your decision to keep the
2 milk pooled on the Western Order?

3 A That would be part of the decision process.

4 Q Okay.

5 MR. BESHORE: Bear with me for a second.

6 (Pause)

7 BY MR. BESHORE:

8 Q I think you answered Mr. Tosi's question that
9 if a supply plant that was located -- if a supply plant
10 that was located outside the marketing area delivered
11 -- under your proposal, Federation proposal, a supply
12 plant located outside the marketing area could become
13 pooled under the Order if it delivered milk to the
14 market, to distributing plants to the market?

15 A The pooled distributing plants in the market.

16 Q Okay. At what rate? Twenty percent?

17 A Yes.

18 Q Okay. I'm wondering if the language as -- as
19 spelled out in your statement provides for that result,
20 which I think is, you know, the correct result. Can
21 you help me with that?

22 A If the supply plant provision currently
23 states 20 percent deliveries to pooled plants and
24 that's what we are, we're not changing that.

25 Q Okay. So, it's your intention to retain that

1 provision for supply plants wherever they might be
2 located. If they perform, whether they're in New York
3 or -- or Washington, if they perform, they're entitled
4 to pool?

5 A If they're sending 20 percent of the milk to
6 a pooled distributing plant in the marketing area.

7 Q Okay.

8 MR. BESHORE: Your Honor, may I have just a
9 --

10 JUDGE HUNT: Sure.

11 (Pause)

12 MR. MARSHALL: If there are no further
13 questions, --

14 JUDGE HUNT: No, Mr. Beshore's not finished
15 yet.

16 MR. MARSHALL: Oh, I'm sorry.

17 MR. BESHORE: I have no further questions,
18 Your Honor.

19 JUDGE HUNT: All right. Okay. Now you can
20 go.

21 MR. MARSHALL: I see no other questioners at
22 this time.

23 JUDGE HUNT: Well, I don't know. Anyone else
24 have any questions? Mr. Cooper?

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CROSS EXAMINATION

BY MR. COOPER:

Q Mr. McBride, let me -- I just want to be clear on your testimony here. I think it's -- is it fair to say that it's your perception that the problems involved with the Southern Idaho milk and this Utah milk were occasioned by the fact that the -- were largely occasioned by the fact that the price service went into effect along with the Federal Order Reform?

A A combination of the price service and then a moving of the location adjustment provision.

Q Part of the price service?

A Yes.

Q Yeah. Okay. And the 80-percent diversion limitation combined with the six-day touch-base, it's your position that that should go a long way to alleviate the problems occasioned in this regard, in regard to the Southern Idaho and Utah milk?

A Yes.

Q And as far as the California milk goes, you normally see that as -- as sufficient solution in itself for --

A No.

Q -- pooled milk being attached?

A No.

1 Q The cost of hauling six days' supply a month
2 won't be enough disincentive for people not to try to
3 attach that milk that stays in California normally,
4 also up here six days?

5 A It would disincentive but it may not stop it.

6 Q Okay. Thank you.

7 MR. COOPER: No further questions.

8 JUDGE HUNT: Anyone else? Okay. Mr.
9 Marshall?

10 MR. MARSHALL: Your Honor, there may be some
11 questions that I'd like to ask Mr. McBride about some
12 of the questions in the last few minutes, but at this
13 point, I'd -- I would appreciate the opportunity to
14 consult with him. So therefore, I ask you to proceed
15 with other witnesses with the possibility we might
16 recall Mr. McBride later, if we need to.

17 JUDGE HUNT: All right. You can recall him,
18 if you want to.

19 MR. MARSHALL: Thank you.

20 JUDGE HUNT: So, it looks like you may be
21 coming back, but in the meantime -- Okay. Mr. McBride,
22 thank you.

23 THE WITNESS: Thank you.

24 (Whereupon, the witness was excused.)

25 JUDGE HUNT: Any other Proponents of the

1 proposal who have witnesses? Yes, sir? You're Mr.
2 Jensen?

3 MR. JENSEN: Yes.

4 JUDGE HUNT: Okay, Mr. Jensen. Good
5 afternoon.

6 Whereupon,

7 VICTOR JENSEN

8 having been first duly sworn, was called as a witness
9 herein and was examined and testified as follows:

10 JUDGE HUNT: All right. And would you state
11 and spell your name, sir?

12 THE WITNESS: My name is Victor, V-I-C-T-O-R,
13 Jensen, J-E-N-S-E-N. I'm a dairy producer, have been a
14 permit holder in Washington State since April of 1967,
15 and involved in the State Dairy Federation since 1988
16 and current president of the organization since October
17 of 2000.

18 DIRECT TESTIMONY

19 THE WITNESS: Washington State Dairy
20 Federation was formed in 1892 to represent the
21 interests of the dairy farmers of the state of
22 Washington. There are over 650 dairy farmers in
23 Washington, producing over \$800 million in milk. The
24 economic effect of dairy farming in Washington is
25 estimated at \$4.5 billion.

1 There are over 4,000 people that work on
2 dairy farms and 20,000 jobs exist to support the
3 industry. From the Northwest counties of Wahkiakum and
4 Skagit to the growing areas of the Southeast
5 Washington, like Yakima and Franklin Counties, dairy
6 farmers are a stable and important key to the economic
7 health of rural Washington.

8 The United States Department of Agriculture
9 has maintained a role in pricing milk since the
10 Depression to help ensure the stable orderly marketing
11 of milk. Our farms and the support industries have
12 grown and prospered because of the stability USDA has
13 provided.

14 Banks make loans to dairy farmers because of
15 predictability. Alfalfa fields are planted for feed
16 because hay farmers can rely on dairy cows needing feed
17 to produce milk. From the cow to the cheese vat,
18 there's a trust that the system will function smoothly.

19 The Washington State Dairy Federation
20 strongly supports the proposal proposed by Northwest
21 Milk Marketing Federation. The proposal by Northwest
22 Milk Marketing Federation corrects a loophole in the
23 Federal Order Rules that have cost producers in
24 Washington millions of dollars.

25 The proposal will provide for a more logical

1 orderly marketing of milk in the Pacific Northwest.
2 The result will encourage trust in the system so many
3 of us rely on. Dairy farmers and members of Washington
4 State Dairy Federation thank you for your consideration
5 and your time on this matter, and we -- if we may be of
6 further assistance, you feel free to call us, and our
7 office number is listed on the testimony that I've left
8 with you.

9 JUDGE HUNT: Okay. Questions of Mr. Jensen?

10 (No response)

11 JUDGE HUNT: All right. Thank you very much,
12 sir.

13 THE WITNESS: Thank you.

14 (Whereupon, the witness was excused.)

15 JUDGE HUNT: Other witnesses in support of
16 the proposal? Good afternoon.
17 Whereupon,

18 HAROLD SCHILD

19 having been first duly sworn, was called as a witness
20 herein and was examined and testified as follows:

21 JUDGE HUNT: Please state and spell your
22 name, please.

23 DIRECT TESTIMONY

24 THE WITNESS: My name is Harold Schild,
25 S-C-H-I-L-D. I'm President and CEO of Tillamuck County

1 Creamery Association. We're a 151-member cooperative
2 producing about 500 million pounds of milk per year,
3 located entirely in the Pacific Northwest Order 124.

4 Tillamuck supports the proposals as put forth
5 by Northwest Milk Marketing Federation and of which
6 we're a member. Just to put a little maybe personal
7 note on to the impact of this, I've calculated our --
8 our average producer in Tillamuck County has about 200
9 milking cows, somewhat smaller than many in the West,
10 and the pool-loading that has occurred, the so-called
11 "pool-loading" that has occurred in the Northwest has
12 in some months cost as much as \$755 to each of our
13 producers on an average, and for many producers, that
14 may not seem like much, but to small producers in an
15 area such as Tillamuck, it's quite a loss to me, and it
16 is a total loss because all of their costs go on on a
17 daily basis, even though their income has been reduced
18 by this amount.

19 So, the producers of Tillamuck County feel
20 quite strongly about this and certainly trust that the
21 Department will be able to see fit to make some
22 corrections in the Federal Order that will at least
23 reduce the possibility of this occurring in the future.

24 Thank you.

25 JUDGE HUNT: Any questions of Mr. Schild?

1 (No response)

2 JUDGE HUNT: All right. Thank you very much,
3 sir.

4 THE WITNESS: Thank you.

5 (Whereupon, the witness was excused.)

6 JUDGE HUNT: Other witnesses in support of
7 the proposals?

8 (No response)

9 JUDGE HUNT: Any in opposition or -- oh, yes,
10 ma'am?

11 Whereupon,

12 BELINDA SILVA

13 having been first duly sworn, was called as a witness
14 herein and was examined and testified as follows:

15 JUDGE HUNT: All right.

16 DIRECT EXAMINATION

17 BY MR. BESHORE:

18 Q Ms. Silva, could you just state your name and
19 address and your occupation and then proceed with your
20 statement on the issues here?

21 A My name's Belinda Silva. I'm a dairy
22 producer in Adams County, Washington, Othella area.
23 It's S-I-L-V-A. Sorry.

24 As I said, I'm a dairy producer in Adams
25 County, Washington. I'm also a Director with the

1 Washington State Dairy Federation as well as a producer
2 member of Dairy Farmers of America.

3 I'm here today to voice my support for
4 Northwest Milk Marketing Federation's proposal to
5 revise pooling provisions of Federal Order 124 in order
6 to reduce the negative impact of diversions to dairy
7 farmers' paychecks.

8 Although this practice is referred to as
9 "diversions, paper pooling, pool-loading", I've even
10 heard the phrases "reverse depooling and interpooling",
11 and it doesn't matter what we call it, the end result
12 is the same. It reduces the paychecks of hard-working
13 dairy farmers.

14 The blend product prices reduced through
15 manipulation of class utilization ranks and as a result
16 sends adulterated signals, thereby creating disorderly
17 market conditions, and this is the total opposite of
18 the whole intent of the Federal Order System.

19 The scary part is this is going to weaken the
20 Federal Order System because we -- we have -- anybody
21 that has been involved in milk, in the dairy industry,
22 past milking the cows, for the past couple years, knows
23 that there is and has been a threat to our Federal
24 Order System coming from the Midwest and other people
25 that don't quite understand that, and anything we do

1 that jeopardizes the value of that system is -- is
2 putting the whole system at risk.

3 Idaho milk has not served as the reserve
4 supply for the Pacific Northwest Market, and it's
5 inappropriate for dollars to be siphoned from Federal
6 Order 124 at the sole expense of the producers who
7 normally supply this market.

8 I had intended to come here with a
9 presentation based on some historical utilization rates
10 and some facts and some data, but I realized that there
11 will be people here who can do that much more
12 effectively than I can. We have impressive people
13 here, people with letters behind their names and -- and
14 documents hanging on their wall. So, they can -- they
15 can do that much better than I can. They're a little
16 more polished than I am, but I'm honest.

17 But what I can do that -- what I can do,
18 though, that many of them can't is I can give you an
19 idea of -- of the perspective from the dairy producer.

20 I can tell you about the Ampadino family. It's a
21 young couple who emigrated here from the Azore Islands
22 of Portugal. They're raising two small adorable little
23 boys. They're milking cows on a rented facility in
24 Warden, Washington.

25 I sat at their kitchen table and tried to

1 explain pool-loading. Now, this is after I spent three
2 days trying to understand it myself, and while I was
3 going over the facts with them and trying to help them
4 understand this, the husband was getting ready to go
5 out and feed his cows, and the wife was pouring a cup
6 of coffee, and she asked me a question I could not
7 answer and that question -- I wrote it down here. Let
8 me find it.

9 Oh, that question was, why do people do this
10 to us? How can other dairymen, a co-op, do this to us?

11 I don't have an answer. I still don't have an answer
12 to that question.

13 I can tell you about the Forresters. The
14 Forresters is a couple that they've already raised
15 their children, and it's just them. They go out every
16 day, all day long, and take care of their cows.
17 They're -- they're physically involved in the daily
18 operations of that dairy and Mr. Forrester said to me
19 in regards to the issue of pool-loading, that "I'm just
20 a guy trying to make a living, and I don't understand
21 this."

22 This is -- this may seem not quite as
23 important as all the facts and the data and the
24 legalese, but this is what Federal Orders -- Federal
25 Order System, this is where all this starts, and this

1 is where all this ends, is with those dairy producers
2 on those dairy farms.

3 So, to me, it is important. I can tell you
4 about the DeGroots. The DeGroots are being squeezed
5 out of the west side when their son decided that he
6 wanted to be the third generation dairy farmer in his
7 family. So, they established a start-up operation on
8 the east side, and the response from that family was
9 very common among many of the producer members of my
10 area or producers of my area that I spoke to.

11 Mrs. DeGroot stated that "we as producers are
12 constantly reminded of how we need to learn to live
13 with market conditions, and yet those market conditions
14 can be distorted through pool-loading."

15 At the Silva Farm, that's my place, we have
16 three days and nights of reading and research and phone
17 calls and confusion, anger and a tremendous unsettling
18 feeling of future insecurity. For three days, I
19 personally spent trying to come to a place where I felt
20 I understood how and why this could happen. I did not
21 know why very quickly because there was a lot of money
22 to be made from pool-loading. So that came quickly.

23 The how took me longer, and after many, many
24 hours, I finally realized that the how had to be a
25 result of an oversight, pure and simple, a mistake.

1 That could be the only explanation for pooling
2 provisions so open and anemic that the act of merely
3 taking advantage of the opportunities they offer in
4 itself circumvents the entire Federal Order System.

5 We have a situation here through lapsed
6 pooling provisions where movement of milk is not
7 performance-oriented in meeting the fluid milk needs,
8 and it's fundamental to the Federal Order System that
9 -- that it is performance-oriented. We need to correct
10 that, and we have an opportunity to do so with the
11 Northwest Milk Marketing Federation's proposal, and
12 that's all I have to say.

13 JUDGE HUNT: Thank you, Ms. Silva. Any
14 questions of Ms. Silva?

15 (No response)

16 JUDGE HUNT: Thank you very much, ma'am.

17 THE WITNESS: Thank you.

18 (Whereupon, the witness was excused.)

19 MR. BESHORE: At this time, we would call
20 Elvin Hollon to testify.

21 Whereupon,

22 ELVIN HOLLON

23 having been first duly sworn, was called as a witness
24 herein and was examined and testified as follows:

25 JUDGE HUNT: Would you state and spell your

1 name, Mr. Hollon?

2 MR. BESHORE: Before Mr. Hollon proceeds, I
3 would like to ask that we mark for identification, as
4 Exhibit 8, his statement regarding Proposals 1 and 2,
5 which he will present, and as Exhibit 9, the Proposed
6 Exhibits, two tables under cover of -- we'll call that
7 Exhibit 9. That would be the tables with his
8 testimony. 8's the testimony which he will read in
9 substantial part at least. We'd like that to be an
10 exhibit for the record, also.

11 JUDGE HUNT: All right. Have it marked for
12 -- give them to the reporter. Well, yes?

13 MR. BESHORE: Yes.

14 JUDGE HUNT: Okay. 8 and 9 have been marked.

15 MR. BESHORE: 8 and 9.

16 (The documents referred to
17 were marked for identification
18 as Exhibit Numbers 8 and 9.)

19 JUDGE HUNT: And would you state your name
20 and spell your name, Mr. Hollon, for the record?

21 THE WITNESS: Elvin, E-L-V-I-N, H-O-L-L-O-N,
22 Hollon.

23 DIRECT EXAMINATION

24 BY MR. BESHORE:

25 Q Before you proceed with your statement, Mr.

1 Hollon, would you briefly relate your professional
2 background for the record?

3 A I have a Bachelor of Science degree in Dairy
4 Manufacturing Management from Louisiana State
5 University and a Master's in Ag Economics from the same
6 institution.

7 I've worked for Dairy Farmers of America
8 since 1979. I've been involved in national
9 agricultural policy, been involved in day-to-day
10 marketing of milk throughout DFA's predecessors, and
11 currently, I deal with Federal Order activities. I've
12 participated and testified and prepared exhibits for
13 several Federal Order hearings, and my current title is
14 Director of Fluid Marketing and Economic Analysis.

15 My responsibilities deal with DFA's day-to-
16 day marketing and Federal Order activity from the
17 corporate standpoint.

18 MR. BESHORE: Okay. Your Honor, we would
19 offer Mr. Hollon as an expert in agricultural
20 economics, dairy economics, milk marketing, and ask
21 that his testimony be received in that capacity.

22 JUDGE HUNT: Well, the Secretary will
23 evaluate the weight to give to it. He appears to be
24 knowledgeable on this subject.

25

1 BY MR. BESHORE:

2 Q Will you proceed, Mr. Hollon?

3 A Sure. First thing I need to do is to correct
4 the words "Kansas City, Missouri" to Seattle,
5 Washington. Perhaps, Judge Hunt, your intuition was
6 warranted.

7 "Statement of Dairy Farmers of America.
8 Dairy Farmers of America, DFA, a member-owned Capper-
9 Volsted Cooperative, of 16,905 farms that produce milk
10 in 46 states. DFA pools milk on 10 of the 11 Federal
11 Milk Marketing Orders, including the Pacific Northwest
12 Federal Order.

13 We support the proposals being raised at this
14 hearing by the Northwest Milk Marketing Federation.
15 DFA is an ardent supporter of Federal Milk Marketing
16 Orders, and we believe that without them, dairy
17 farmers' economic livelihood would be much worse.

18 Federal Orders are an economically-proven
19 marketing tool for dairy farmers. The central issue of
20 this hearing providing for orderly marketing and
21 economically-justifying the appropriate performance
22 qualifications for sharing in the marketwide pool
23 proceeds as an Order is the heart of the Federal Order
24 System.

25 If these issues are not addressed properly

1 systemwide, Orders will be jeopardized. That would be
2 detrimental to all the members of our group, both in
3 their day-to-day dairy farm enterprises and in the
4 milk-processing investments that they have made.

5 Summary of Proposals for this Hearing. We
6 have an interest in the proposals being heard at this
7 hearing and the amendments being requested by producers
8 due to the present-day dynamics surrounding the pooling
9 of milk in Federal Milk Marketing Orders.

10 Proposals 1 and 2 deal with the open pooling
11 of large volumes of milk from locations distant to the
12 market. Milk distant to the market needs to have
13 additional performance requirements that are workable
14 and consistent systemwide with Federal Order policy.
15 This is not just a Federal Order 124 issue.

16 With regard to Proposals 1 and 2, we note
17 that the underlying issue is not just the local 124
18 issue. We have concerns identical to those expressed
19 by the other Proponents here and in the Central,
20 Mideast and Upper Midwest Federal Orders, that milk in
21 distant areas is pooling on the Order and drawing down
22 the blend price but not serving the market in any
23 regular form.

24 We have concerns similar to these in Order
25 135. There, large volumes of milk are finding their

1 way on to the pool but not performing for the market in
2 a reasonable manner. We find this practice detrimental
3 for our members, our customers and the entire Federal
4 Order System.

5 We have presented proposals and testimony
6 supporting them in hearings held in the Upper Midwest,
7 Mideast and planned to express that concern in other
8 Federal Order hearings and seek solutions that are
9 consistent and in line with Federal Order principles
10 systemwide.

11 I might add at this point that we've also
12 presented testimony in a hearing in the Central Federal
13 Order.

14 The central issue in each case is the
15 interface between the pricing service altered by
16 Federal Order Reform and the pooling provisions found
17 in each Order. These relationships were changed by
18 reform. The link between performance and pooling was
19 altered in these reviews.

20 Organizations, including DFA, have moved
21 quickly to take advantage of these changes in Order
22 rules. Indeed, to be competitive in the economy, if a
23 competitor makes a pooling decision that results in
24 increased funds, you must attempt to do the same or
25 face a more difficult competitive position.

1 Individual organizations cannot unilaterally
2 disarm. We think this process of excessive distant
3 market open pooling is inconsistent with Federal Order
4 policy and clearly disparaging in the Reform Record.

5 The end result of this action is that milk
6 that rarely, if ever, performs for the market pools and
7 reduces blend returns for producers that regularly
8 perform for the market.

9 Federal Order Reform. The Final Rule
10 published on September 1, 1999, in the Federal Register
11 culminated in the Federal Order Reform process. It was
12 a lengthy process but produced needed beneficial
13 results for the industry which could not have been
14 accomplished without the informal rulemaking process.

15 Through it, the number of Federal Orders were
16 reduced from 31 Orders or marketing areas down to 11.
17 It provided clear rules for what constitutes a market.

18 The pricing provisions would improve, modernize and
19 make more uniform and transparent across the Federal
20 Order System.

21 A more common classification system is
22 standardization of the provisions common to all Orders
23 was instituted. The Option 1-A differential service
24 that was the result of extensive computer modeling and
25 was extensively evaluated by university, government and

1 industry persons, a superior advancement, Class 1
2 advanced price mechanism.

3 The higher-up pricing mechanism for Class 1
4 and common multiple component pricing provisions across
5 all Orders using component pricing were all valuable
6 improvements in the Federal Order Program.

7 Even though the process was lengthy and
8 thorough, the dairy industry is dynamic and changing,
9 and we currently find that provisions in the Order
10 System need review and alteration. Herein, the need
11 review includes the pricing provisions that were
12 addressed in the Class 3 and 4 hearings held last
13 Spring, Docket Number AO-14-19, etc.

14 The combination of an absolute versus a
15 relative price service that we now have and its
16 interface with the prevailing pooling provisions is an
17 issue that is now plaguing the industry and is being
18 addressed in this and other Order hearings.

19 Federal Order Benefits and Principles.
20 Federal Orders offer benefits to both producers and
21 handlers and have always operated in a deliberate and
22 organized manner guided by basic economic principles.
23 Two primary benefits of Orders are to allow producers
24 to gain from the orderly marketing of milk and to share
25 the proceeds through marketwide pooling.

1 Orderly marketing embodies principles of
2 common terms and pricing that attracts milk to move to
3 the highest-value market when needed and clears the
4 market when not needed. Marketwide pooling allows
5 qualified producers to share in the return to the
6 market equitably and in a manner that provides
7 incentives to supply the market in the most efficient
8 manner. Becoming qualified to share in the blend price
9 is directly related to the level of performance
10 described in each specific Order provisions.

11 The Concept of a Market. Fundamental Federal
12 order principles are the concepts of a marketing area
13 market and the concept of performing to the market in
14 order to be qualified to share in the returns from that
15 market.

16 The Federal Milk Order Marketing Statistics
17 Annual Summary defines a marketing area as "a
18 designated trading area within which the handling of
19 milk is regulated by the Federal Order."

20 It is clearly an identified geographic area
21 and defined deliberately by a set of rules and for a
22 specific purpose. Every set of Federal Order
23 regulations, Section 2, defines the geographic area of
24 the marketing order.

25 Federal Order Reform sought out industry

1 comment on marketing areas, established seven criteria
2 for their establishment and then used those criteria to
3 divide much of the lower 48 states into 11 Federal
4 Order Markets.

5 The criteria and the Department's explanation
6 of them taken directly from the Final Rule are as
7 follows. These same seven primary criteria used in the
8 two preliminary reports and the proposed rule were used
9 to determine which markets exhibit a sufficient degree
10 of association in terms of sales, procurement and
11 structural relationships to warrant consideration.

12 The Final Rule explained the criteria as
13 follows. Number 1. Overlapping Route Disposition.
14 The movement of packaged milk between Federal Orders
15 indicates that plants from more than one Federal Order
16 are in competition with each other for Class 1 sales.

17 In addition, a degree of overlap that results
18 in a regulatory status of plants shifting between
19 Orders creates disorderly conditions and changing price
20 relationships between competing interests and
21 producers. This criteria is considered to be most
22 important.

23 2. Overlapping Areas of Milk Supply. This
24 criteria applies principally to areas which major
25 proportions of the milk supply is shared between more

1 than one Order. The competitive factors affecting the
2 cost of the handler's milk supplies are influenced by
3 the location of the supply.

4 The pooling of milk produced within the same
5 procurement area, under the same Order, facilitates the
6 uniform pricing of producer milk. Consideration of the
7 criteria of overlapping procurement areas does not mean
8 that all areas having overlapping areas of milk
9 procurement should be consolidated.

10 An area that supplies a minor proportion of
11 an adjoining area's milk supply with a minor proportion
12 of its own total milk production while handlers located
13 in the area are engaged in minimal competition with
14 handlers located in adjoining area likely does not have
15 a strong-enough association with the adjoining area to
16 require consolidation.

17 For a number of the consolidated areas, it
18 would be very difficult, if not impossible, to find a
19 boundary across which significant quantities of milk
20 are not procured for other marketing areas. In such
21 cases, analysis was done to determine whether the
22 minimal amount of route disposition overlap between the
23 areas occurred, and the criteria of overlapping route
24 disposition generally was given greater weight than
25 overlapping areas of milk supply. Emphasis added.

1 Footnote 1. Milk procurement areas were
2 considered as a criteria for Order 124 boundaries and
3 the distant areas in question here were not found to be
4 part of the Order's marketing area.

5 Some analysis was done to determine whether
6 milk pooled on adjacent markets reflects actual
7 movements of milk between markets or whether the
8 variations in amounts pooled under a given Order may
9 indicate that some milk is pooled to take advantage of
10 price differences rather than because it is needed for
11 Class 1 use in the other market. Footnote 2. Emphasis
12 added.

13 Excuse me. Open pooling was reviewed and was
14 not considered to be criteria for deciding marketing
15 area. Certain areas were not put together as markets
16 if the basis for commonality was for economic paper
17 pooling versus meeting the criteria established.

18 Additional analysis was done to make sure
19 whether or not milk supplies that were associated with
20 the Order, including those that were paper pooled,
21 really should be a factor in determining the marketing
22 area. In the case of Order 124, the distant milk in
23 question here was not included in the marketing area."

24 Since my statement is included, I'm going to
25 skip the reading of Points 3, 4, 5 and 6 and 7, and I

1 don't have any other additional comments, other than to
2 move down to the Concept of Pooling Market Proceeds on
3 Page 6.

4 "The Concept of Pooling Market Proceeds. All
5 Federal Orders today save one provide for the
6 marketwide pooling of milk proceeds among all producers
7 supplying the market. The one exception to this form
8 of pooling is found in the Michigan Upper Peninsula
9 Market where individual handler pooling has been used.

10 Marketwide sharing of the classified use value of milk
11 among all producers in a market is one of the most
12 important features of a Federal Milk Marketing Order.

13 It ensures that all producers and supply
14 handlers in a marketing area receive the same uniform
15 price for their milk, regardless of how their milk is
16 used. This method of pooling is widely supported by
17 the dairy industry and has been universally adopted for
18 the 11 Consolidated Orders. 64 Federal Register 16130,
19 April 2nd, 1999.

20 Additionally, each Order has precise terms
21 that a supplier must follow in order to share in the
22 blend proceeds. These provisions are known by the
23 industry as performance standards. This concept is
24 explained, defended and endorsed in the Final Rule as
25 follows.

1 There were a number of proposals and public
2 comments considered in determining how Federal Milk
3 Orders should pool milk and which producers should be
4 eligible to have their milk pooled in the Consolidated
5 Orders.

6 Many of these comments advocated a policy of
7 liberal pooling, thereby allowing the greatest number
8 of dairy farmers to share in the economic benefits that
9 arise from the classified pricing of milk.

10 A number of comments supported identical
11 pooling provisions in all Orders, but others stated
12 that pooling provisions should reflect the unique and
13 prevailing supply and demand conditions in each
14 marketing area.

15 Fundamental to most pooling proposals and
16 comments was the notion that the pooling of producer
17 milk should be performance-oriented in meeting the
18 needs of the pooling market. This, of course, is
19 logical since the purpose of the Federal Milk Order
20 Program is to ensure that an adequate supply of milk
21 for fluid use. Footnote 3. Emphasis added here.

22 Footnote 3. The concept of a performance standard
23 is fundamental to the Federal Order System and was
24 endorsed by both the industry and the Secretary."

25 Moving back up. "A suggestion for open

1 pooling where milk can be pooled anywhere has not been
2 adopted, principally because open pooling provides no
3 reasonable assurance that milk will be made available
4 in satisfying the fluid needs of the market.

5 Footnote 4. Emphasis added. Open pooling
6 was totally rejected in the forum deliberations by the
7 Secretary.

8 The pooling provisions for the Consolidated
9 Orders provide a reasonable balance between encouraging
10 handlers to supply milk for fluid use and ensuring
11 orderly marketing by providing a reasonable means for
12 producers within a common marketing area to establish
13 an association with the fluid market.

14 Obviously matching these goals to the
15 disparate marketing conditions found in different parts
16 of the country requires customized provisions to meet
17 the needs of each market. For example, in the Florida
18 Marketing Area, where close to 90 percent of the milk
19 in the pool will be used for fluid use, pooling
20 standards will require a high degree of association
21 with the fluid market and will permit a relatively
22 small amount of milk to be sent to manufacturing plants
23 for use in lower-value products.

24 In the Upper Midwest Market, on the other
25 hand, a relatively small percentage of milk will be

1 needed for fluid use. Accordingly, under the pooling
2 standards for that Order, smaller amounts of milk will
3 be required to be delivered to fluid milk plants and
4 larger amounts of milk will be permitted to be sent to
5 manufacturing plants for use in storable products, such
6 as butter, nonfat dry milk and hard cheese.

7 The specific pooling provisions adopted for
8 each Order are discussed in detail in the sections of
9 this document pertaining to each of the Consolidated
10 Orders. 64 Federal Register 16130, April 2, 1999.

11 We find no compelling reason to change this
12 guideline. Open pooling is a cause for concern for our
13 members in Federal Order 124. They have concern when
14 milk from distant areas shares in the blend price pool
15 but does not perform, that it does not deliver
16 regularly nor balance the market.

17 The cost of providing these services to the
18 market always falls back on the local milk supply, and
19 if this current practice is not amended, it will
20 guarantee a lower return for the local dairy farmers
21 who supply the local Class 1 market.

22 The resulting draw of blend price funds to
23 distant producers who do not perform is not reasonable.

24 It was analyzed and excluded by Order Reform and thus
25 is an end run that should not be allowed now.

1 Additionally, open pooling has an inherent
2 conflict with the principles underlying the models that
3 formulated the price purposes driving reform. The
4 differential models assume that supplies of milk
5 associated with the demand point and aggregated into a
6 market actually shift from the counties they were
7 located in to the population centers whether the demand
8 points were fixed.

9 To the best of our knowledge, there were no
10 provisions in the mathematical equations for those
11 models allowing for milk to be associated with the
12 market if it did not actually ship to or supply the
13 market.

14 The current practice clearly exploits that
15 price service, and if we are to retain it, which we
16 support doing, we must structure the regulations to
17 parallel with that. This means that using direct
18 deliveries from inside the marketing areas to qualified
19 supply plants and milk supplies from outside the
20 marketing area should be greatly limited, if allowed at
21 all.

22 The principle of allowing direct-shipped milk
23 to qualified supply plants was instituted to allow
24 achievement of the economies of direct-shipped milk,
25 safe from the cost of reloading that is now being used

1 for another purpose, such that milk produced in the
2 market for supplies located far out of the market can
3 meet the qualification equation.

4 This runs counter to the initial intent of
5 the provision and the principles that form the pricing
6 grid. Performance standards are universal in their
7 intention to require a level of association to a market
8 that are marked by the ability and willingness to
9 supply that market.

10 However, they are individualized in their
11 application. Each market requires standards that work
12 with the conditions that apply in that market. The
13 reform record develops and defends this concept.

14 A review of the various Federal Order
15 Performance Standards shows the diversity of standards
16 but the common requirement for performance to the
17 market in order to share in the blend price pooling.

18 During the reform process that the individual
19 Order performance standards were being evaluated, many
20 times, a particular standard was chosen from one of the
21 present predecessor Orders. Frequently the most
22 lenient standard was selected from among the group of
23 available choices. This attempt, however good in its
24 intent, has not always proven to be workable and is one
25 of the reasons for this proceeding.

1 Exhibit 9, Table 1, entitled "Summary of
2 Producer Milk Provisions Under Federal Milk Marketing
3 Orders", is a comparison of Federal Order Producer Milk
4 Standards. Note that while the intentions of the dairy
5 standards are the same, to establish the requirements
6 necessary to share in the Order's proceeds, the
7 specifics vary from Order to Order.

8 Exhibit 9, Table 2, entitled "Summary of
9 Minimum Pooling Standards for Supply Plants Under
10 Federal Orders", is a comparison of Federal Order
11 Pooling Standards. Again note that while the intention
12 of the dairy standards are the same, to establish the
13 requirements necessary to share in the Order proceeds,
14 the specifics vary from Order to Order."

15 Q Okay. Would you go to Exhibit 9, Mr. Hollon,
16 and just describe generally Table 1, whether there are
17 any -- any particular characteristics that stand out on
18 that comparison of conditions with respect to Pacific
19 Northwest Order and the producer conditions for
20 diversion?

21 A In this case, this data was -- was drawn from
22 a summary sheet that was taken from the Dairy Program
23 staff. Each Order, each marketing area, is in place,
24 and the individual producer conditions for diversion
25 are extracted, summarized in the handler diversion

1 limits, and I would point out that the diversion limits
2 that were changed by a result of the Market
3 Administrator's discretionary action is incorrectly
4 reported here in that the 99 percent should be 80
5 percent, also.

6 Q Okay. Well, the 99 percent is the Order as
7 originally promulgated.

8 A Right. That's correct.

9 Q The 80 percent is the current requirement as
10 modified by the Market Administrator's action as
11 testified to by Mr. Van Dam and/or Mr. McBride earlier.

12 A That is also correct, and it's probably
13 notable to point out that initially, there was no
14 touch-base standard for the Pacific Northwest Order.
15 So, that's certainly a noticeable difference from any
16 other Order, and then the diversion limits are probably
17 on the -- on the high side of other Orders, but then
18 the -- the -- the main point of this exhibit is to show
19 that there are some type of limits or rules for every
20 Order and that they're individualized in their
21 application.

22 Q Is it your observation that they tend to be
23 crafted through the level of Class 1 utilization in the
24 particular Order?

25 A That's right. There's some -- there's a

1 relationship with the performance to the market. The
2 higher the Class 1 used, the greater the performance
3 requirement is to the market. So, there's a definite
4 link between performance and requirement.

5 Q Would you look at Exhibit 9, Table 2, then
6 and tell us how you assembled that information?

7 A This information was taken from a summary
8 statement of Order Provisions provided by the Dairy
9 Programs staff shortly after Federal Order Reform, and
10 it's simply an extraction of each individual Order and
11 the -- the minimum shipment requirements by month and
12 by percent to distributing plants, qualified supply
13 plants, and if there is an automatic pooled plant
14 qualification, it limits those -- it details those
15 periods, and again to point out that every Order, you
16 know, has some degree of specificity as to what happens
17 in its Order.

18 Some Orders have more than one percentage
19 that applies to different months in the year, and not
20 every Order has what's commonly called a "free ride
21 period". Some -- some Orders do, and those that do, it
22 tells what you'd have to do and what months you'd get,
23 and again the overriding intent of this is to point out
24 that every Order has some type of performance
25 standards, and they vary from Order to Order.

1 Q Okay. Now, when you prepared for this
2 hearing, Mr. Hollon, were you anticipating to get
3 involved in the debate about double dipping and
4 California-regulated milk?

5 A While I did prepare for that in discussions
6 with the Proponents, we felt like, you know, that that
7 issue was not going to come up. So, we ceased our
8 preparation. We did offer, we did prepare some -- a
9 proposal that's consistent with what we had proposed in
10 Order 30 and Order 32, but at that time in an agreement
11 with the Proponents, we laid that aside.

12 Q Okay. Since that issue has been brought into
13 the hearing with the testimony this morning, do you
14 have some testimony to present with respect to how DFA
15 believes that problem should be addressed?

16 A I do.

17 Q Okay. And have you -- has DFA presented a
18 consistent method in other hearings for addressing the
19 problem of state-regulated milk being pooled on the
20 federally-regulated Orders?

21 A In the two Order hearings where that was an
22 issue, Order 30 and Order 32, we presented a proposal
23 that was identical in style.

24 Q Okay. And to what you would plan to present
25 now?

1 A Correct.

2 Q Okay. And would you -- do you have some
3 prepared comments to present with respect to the -- to
4 that -- that proposal and some proposed Order language?

5 A I do, and there's copies there. They have
6 not been distributed.

7 MR. BESHORE: Let me hand out this three-page
8 document, which is just titled "Proposed Language" on
9 the first page.

10 (Pause)

11 MR. BESHORE: I would ask that this three-
12 page document, which just says "Proposed Language" on
13 the first page, be marked as Proposed Exhibit 10.

14 (The document referred to was
15 marked for identification as
16 Exhibit Number 10.)

17 THE WITNESS: I would point out again that
18 one of our overriding concerns in all of these
19 hearings, the three that have been held and the one
20 today, the one we expect to be held next Spring in the
21 Western Order, and the one we expect to be held some
22 time in next year in Federal Order 1, is that there be
23 a systemwide application to many of the issues, and
24 that we are not supportive of, I guess, a patchwork
25 quilt of regulatory changes.

1 So, with that in mind, if -- if this type of
2 proposal is going to be heard here, depending on how
3 this morning's deliberations ultimately get decided on,
4 we would like to offer this language for the
5 Secretary's consideration.

6 BY MR. BESHORE:

7 Q Okay. Would you proceed then with the
8 comments and suggestions on Exhibit 10?

9 A Okay. The solutions regarding the pooling of
10 California milk is unsatisfactory for several reasons.

11 It does not recognize the primacy of a marketing area
12 nor does it address the concerns of a performance
13 standard. We feel that any proposal must incorporate
14 these fundamentals.

15 The setting of an arbitrary standard that
16 cannot be measured with an economic ruler is not the
17 right way to go and may suffer from future legal
18 challenge. It does not address the total universe of
19 the potential supply that can attach itself to the
20 market but never serve the market.

21 It may result in unforeseen negative comments
22 between milk -- I'm sorry -- negative consequences
23 between milk pooled in Federal Orders and milk pooled
24 in state Orders. There are state milk marketing orders
25 in California, Nevada, North Dakota, Montana, Virginia,

1 Pennsylvania, New York and Maine. There have been
2 proposals in recent years in Texas, Kansas, Nebraska,
3 and even occasionally in Wisconsin for state Orders to
4 be promulgated.

5 The interface between Federal Orders and the
6 existing state Orders is difficult to determine and
7 impossible with potential future state orders. In
8 fact, I participated in discussions recently with a
9 state trade association of dairy farmers seeking input
10 on the establishment of a new state order.

11 We see no reason to seek a solution that may
12 incur future trouble when better solutions are
13 available. It may result in unforeseen negative
14 consequences between milk pooled in Federal Orders and
15 milk pooled in compacts.

16 While the current existence of compacts is
17 threatened, we suspect they are not dead. There is
18 even talk of a national compact that would include the
19 Upper Midwest. We see no reasons to seek a solution
20 that may incur future trouble when better solutions are
21 easily available, and I guess I might say that I'm not
22 aware of the morning's discussions on the Leahy bill.
23 So, I don't know the exact life of those.

24 5. It requires an additional audit burden
25 and the authority to collect that information may not

1 be available. To our knowledge, the California state
2 officials are under no requirement to furnish data for
3 audit in the Federal Order System.

4 Enactment of the Proponents' proposed
5 solution would only migrate the problem to other Order
6 areas. A more uniform application to all Orders that
7 would solve or alleviate greatly this concern is a
8 superior choice.

9 With regard to our proposal -- and Scratch 7.
10 That was a last-minute mistake. We note, Number 1,
11 the concept is already in place in Federal Order 1,
12 Northeast Order, and was in place in Federal Order 2
13 prior to reform. So, it has already stood the test of
14 time.

15 It recognizes the principles of both a
16 marketing area and the performance aspect of marketwide
17 pooling. It has already been proposed for use in
18 Federal Order 30 and 32 and its continued use would be
19 consistent here.

20 It carries little additional recordkeeping or
21 audit burden. It has a measurable economic consequence
22 that is in line with existing Order principles, that if
23 the economics are positive, regulation does not
24 prohibit pooling.

25 By requiring performance similar to other

1 local milk supplies, the intangibles of rejected loads,
2 bad weather and a bearable demand for bottlers causes
3 the return to be less dependable and the risk greater.
4 This, however, causes the decisionmaking process faced
5 by the distant supplier to be more like that faced by
6 local milk supplies.

7 The individual state unit concept is an
8 adequate and reasonable safeguard for Order 124.
9 Furthermore, requiring each state unit to perform
10 individually prevents an in-area milk supply for
11 qualifying distant milk. It also discourages distant
12 milk from seeking a large block -- large supply block
13 from a nearby state and forming a unit to ease the
14 performance requirement.

15 We find schemes similar to this occurring in
16 other Federal Orders, and they disrupt orderly
17 marketing practices there. We wish to avoid their
18 spread. Thus, our proposed Order language would read,
19 and I would point out that since there was some debate
20 this morning about various provisions and what they
21 would be numbered and how -- and, you know, if they
22 would be found exactly as they were proposed, I was
23 unable to put the exact paragraph citation in it.

24 But, in general, and the principle that we're
25 -- that we would put forth with regard to Section

1 124.7, the pooled plant section, Section C, would read
2 something similar to "if milk is delivered to a plant
3 physically located outside the states of Oregon,
4 Washington and the counties of Idaho that are currently
5 in the marketing area by producers also located outside
6 the areas specified in this paragraph, producer
7 receipts at such plants shall be organized by
8 individual state units and each unit shall be subject
9 to the following requirements.

10 Each unit shall be reporting separately,
11 pursuant to Section 124.30, at least the required
12 minimum percentage specified in Section 1124.7(c) of
13 the Producer Milk Section of each of the producer milk
14 of each unit of the handler shall be delivered to
15 plants described in Section 1124.7(a) or (b), and such
16 delivery shall not be used by the handler in meeting
17 the minimum shipping requirements required pursuant to
18 Sections 124.7 and again whichever one that is, and 3,
19 the percentages of Section 124.7(c) are subject to any
20 adjustments that may be made pursuant to Section
21 124.7."

22 This is the sections that refer to the
23 discretionary authority that the Market Administrator
24 may have the provisions. So, if the supply plant
25 percentages or days or free ride periods or months are

1 adjusted, it would apply the same way.

2 In Section 1124.13, the Producer Milk
3 Section, subject to the conditions of Paragraph, and
4 again unknown here in this section, producer milk means
5 that skim milk or the skim milk equivalent components
6 of -- components of skim milk, including non-fat
7 components and buttermilk, of a producer, that is, and
8 down in Section E, milk receipts from producers whose
9 farms that are physically located in Oregon, Washington
10 and the counties of Idaho that are currently in the
11 marketing area, such producers shall be organized by
12 individual state units and each unit shall be subject
13 to the following requirements.

14 Each unit shall be reported separately,
15 pursuant to Section 1124.30. For pooling purposes,
16 each reporting unit must satisfy the shipping standards
17 specified for in a supply plant pursuant to 1124.7(c)
18 and such delivery shall not be used by the handler to
19 meet the minimum shipping percentages required pursuant
20 to Section 1124.13, again those exact sections are
21 unknown, and percentages of Section 1124.13 are subject
22 to any adjustments that may be made pursuant to, and
23 this again refers to the Market Administrator
24 discretion section.

25 Q Mr. Hollon, would it be fair to summarize

1 DFA's position with respect to potential pooling of
2 milk from California or other state-regulated sources
3 of Federal Orders that for Federal Order purposes, the
4 pooling of milk should be determined on the basis of
5 whether it performs or does not perform for the Federal
6 Order and not on the basis of any status it has under
7 present or future state regulatory programs?

8 A That is correct.

9 Q And is that the purpose of this hastily-
10 prepared response to the proposal --

11 A That is correct.

12 Q -- that you've presented?

13 A Yes.

14 Q Okay.

15 MR. BESHORE: With that, I would move for the
16 admission of Exhibits 8, 9 and 10, and make Mr. Hollon
17 available for cross examination.

18 JUDGE HUNT: With respect to the Exhibits 8,
19 9 and 10, are there any objections? Mr. English?

20 MR. ENGLISH: Well, Your Honor, I'm going to
21 object to Exhibit 10, and I wasn't the one who, if
22 someone wanted to argue about opening doors, opened any
23 doors to this, and I represent not only Suisse Foods
24 but in other hearings have represented people who, as
25 Mr. Beshore in his own words, have made a principle

1 argument about how one ought to deal with California
2 milk, and those parties were not notified that this
3 issue would be an issue here in terms of DFA's
4 proposal, and so, you know, it may be a bit of Mr.
5 Beshore's own arguments, but I do object to Exhibit 10
6 on the grounds that this issue has not been noticed.

7 There are differences, for instance, in the
8 Central Order and the -- the Central Order and the
9 Upper Midwest. Arguments were made by this particular
10 witness about the economic feasibility of moving milk
11 in units of this kind for performance, and I think
12 those economic arguments would not hold true, given the
13 fact that Oregon is geographically connected to
14 California, and therefore I would argue that -- that a
15 lot of this is outside the scope, in fact the entire
16 Exhibit 10 is outside the scope of the Hearing Notice
17 and would urge rejection of Exhibit 10.

18 JUDGE HUNT: I see no reason why you can't
19 brief the argument. I have -- I've already ruled on
20 the -- on allowing it as it possibly being within the
21 scope, and it's for the Secretary to decide.

22 If you want to brief it for the Secretary's
23 information, whether it is or isn't, you're -- you can
24 do that, but any other objections to 8, 9 or 10? Mr.
25 Berde?

1 MR. BERDE: I don't know that it's an
2 objection or a question, so that I could have --

3 JUDGE HUNT: All right.

4 MR. BERDE: -- the basis for an objection, if
5 I need one.

6 JUDGE HUNT: Sure.

7 VOIR DIRE

8 BY MR. BERDE:

9 Q As you -- you referred to this as a hastily-
10 prepared amendment to submit at this hearing, is that
11 right?

12 A The actual writing up was done over a brief
13 amount of time. The logic behind it has been
14 consistent and has been prepared from that information.
15 The "hastily" refers only to the putting together of
16 these three sheets of paper and getting them available
17 to hand out here.

18 Q In deciding to present this proposal at this
19 hearing, have you made a sufficient analysis of whether
20 or not this proposal would in any manner impact,
21 affect, contradict or raise ambiguities with respect to
22 Proposals 1 and 2?

23 A I have made no such analysis.

24 Q So, sitting here today, we don't know whether
25 in fact we can support or whether we should oppose the

1 proposal because we have not made such an analysis?

2 A Would that be grounds to make that
3 conclusion?

4 Q I'm asking you the question.

5 A That's part of my answer. Would that be
6 grounds to make that conclusion?

7 Q Yeah. Well, we would -- we would have to
8 decide if your proposal does impact upon subsequent
9 analysis affect Proposals 1 and 2. We would have to
10 determine whether we can support it or not, and we
11 can't do that at this point.

12 A Then I would answer your question that that
13 is probably true if it applies equally to every
14 modification with this point that's been made here
15 today. You're probably right, that the ones that were
16 made, the modifications that were made this morning
17 would also be subject to that same criticism, that
18 there's no analysis made, no analysis presented, no
19 economic justification anyone could look at.

20 MR. BERDE: Well, with that response, Your
21 Honor, I would have to join in the objection.

22 JUDGE HUNT: Any other objections to 8, 9 and
23 10?

24 MR. BERDE: I have one more question --

25 JUDGE HUNT: Yes, sir, Mr. Berde.

1 MR. BERDE: -- arising out of another --

2 BY MR. BERDE:

3 Q On Page 8, on Page 8 of your statement, --

4 JUDGE HUNT: On proposed language?

5 BY MR. BERDE:

6 Q -- I want to clarify something.

7 JUDGE HUNT: On language? On the proposed
8 language?

9 MR. BERDE: No.

10 BY MR. BERDE:

11 Q On Page 8 of your statement -- of the
12 statement, --

13 JUDGE HUNT: Oh, okay.

14 BY MR. BERDE:

15 Q -- toward the bottom, the second paragraph
16 from the bottom, begins "This means", etc.

17 A Hm-hmm.

18 Q It is not your intent, I would assume, to
19 have the Secretary limit or prohibit the marketing in
20 the Pacific Northwest Order of milk produced in any
21 place in the United States as the law -- the law would
22 present certain problems with that, would it not?

23 A It would. I agree with you.

24 Q And it is your intent, however, that with
25 respect to regulations that the Secretary may lawfully

1 adopt, he should fashion them in such a manner as to
2 ensure that the milk that is pooled is in fact milk
3 that is -- that has the right to participate in the
4 Class 1 proceeds to the market by virtue of its
5 performance?

6 A Yes, that would be a good description.

7 JUDGE HUNT: Mr. Marshall?

8 MR. MARSHALL: Thank you, Your Honor. Just
9 for point of clarification. Have you agreed that this
10 is within the scope of the hearing? Have you ruled
11 that this is within the scope of the hearing or are you
12 still --

13 JUDGE HUNT: No. I'm allowing it because I'm
14 not sure whether it falls within the scope of the --
15 pooling -- with the announcement. As I said this
16 morning, I am not -- this does not bind the Secretary.
17 If the Secretary determines that it's not a
18 modification within the scope, then I'm allowing it in
19 the event that -- that it is considered relevant.

20 MR. MARSHALL: So, at this point, questions
21 are relevant as to the substance and its impact?

22 JUDGE HUNT: Well, the three exhibits right
23 now, proposed exhibits, whether they should be admitted
24 or not. That's right now.

25 MR. MARSHALL: Right.

1 JUDGE HUNT: Are you objecting to these three
2 exhibits?

3 MR. MARSHALL: I may be objecting to the
4 admission of 10.

5 JUDGE HUNT: But you want to question first,
6 like Mr. Berde?

7 MR. MARSHALL: Yes.

8 JUDGE HUNT: Okay.

9 MR. MARSHALL: With the understanding that
10 this will help me determine whether there's an
11 objection but also, of course, goes to the substance of
12 the proposed language.

13 VOIR DIRE

14 BY MR. MARSHALL:

15 Q Elvin, just to clarify, is this being offered
16 as an alternative to Proposals Number 1 and 2?

17 A As an alternative? No.

18 Q Exhibit 10 and the testimony that was read in
19 from Exhibit 10, you began by stating, "The solutions
20 regarding the pooling of California milk". Are you
21 referring to the discussion earlier in this hearing,
22 first in Mr. English's cross examination of Mr. Van Dam
23 and then in Mr. McBride's testimony, --

24 A Yes.

25 Q -- on the specific language that was

1 suggested?

2 Well, let's kinda go through these here.
3 With respect to your Point Number 1, in what way does
4 Mr. McBride's proposal not recognize the primacy of the
5 marketing area?

6 A It is -- appears to be strictly geographic.
7 If milk originates in California or Montana, Virginia
8 or Pennsylvania, it would be excluded. So, it doesn't
9 make any bearing with the Federal Order Marketing Area
10 if it performs in that marketing area.

11 Q Well, may I remind you that Mr. McBride
12 testified that he's not concerned about milk arising in
13 the -- that's produced in the state of California, if
14 it's pooled, regularly pooled in the Pacific Northwest
15 Order, and in fact, we testified -- he testified as to
16 Mr. Van Dam to a number of producers traditionally
17 associated with the Pacific Northwest Order whose milk
18 is not also pooled on the California Order.

19 A That the standard of saying that it's in an
20 area where there's a state marketing order, was pooled
21 on the state marketing order, we don't think that
22 that's a sufficient reason to exclude it.

23 Q I can understand that point, if that's what
24 we were talking about.

25 MR. MARSHALL: May I -- Your Honor, may I

1 give the witness a copy of Mr. McBride's testimony, so
2 he may refer to the exact language that Mr. McBride was
3 proposing?

4 BY MR. MARSHALL:

5 Q Do you have a copy with you?

6 A No.

7 JUDGE HUNT: That was --

8 MR. MARSHALL: It's not an exhibit, Your
9 Honor.

10 JUDGE HUNT: Do we have a copy? That's not
11 an exhibit, no.

12 BY MR. MARSHALL:

13 Q Look at the last page.

14 A Okay.

15 (Pause to review document)

16 MR. MARSHALL: Let the record show I've
17 handed Mr. Hollon the testified -- the prepared
18 testimony of Dan McBride and pointed out to him the
19 last page thereof which includes the specific language
20 that Mr. McBride was suggesting as additional language
21 to Section 1124.13(e)(1).

22 THE WITNESS: I'm assuming you're referring
23 to the section that's underlined? "That no milk of a
24 dairy farmer shall be eligible for diversion if any
25 portion of that milk is pooled under a state order with

1 a market supply pool."

2 MR. MARSHALL: Yes, that's the language to
3 which I refer and that is the language which Mr. -- I
4 represent to you that that is the language which Mr.
5 McBride suggested be added to the other language which
6 is in the Hearing Notice as a solution to the
7 California problem, as Mr. McBride was testifying to
8 it.

9 BY MR. MARSHALL:

10 Q Now, before I handed you that, I believe you
11 testified that milk should not be excluded, California
12 or Montana or any other milk should not be excluded
13 merely by virtue of being produced in a state that has
14 a state order in a marketwide pool.

15 A Right.

16 Q The language that we've been -- just been
17 pointed out to you, and that we've been discussing
18 here, Mr. McBride's suggestion, does not do that, does
19 it? It does not draw a distinction between where the
20 milk is produced, merely where it's pooled?

21 A We would -- we would also object to this
22 being the standard for exclusion, and we would say that
23 the proposal that we've made would be a superior choice
24 to measure performance rather than this choice.

25 Q I think I follow your point there, and let's

1 get to that in time here.

2 A Okay.

3 Q But for openers, I want to make sure we're
4 not misunderstanding the proposal from Mr. McBride,
5 which in effect says that such milk, California milk,
6 pooled on the California Order, could not also be
7 considered a diversion to a California plant under the
8 Federal Order, is that not correct?

9 A I'm sorry. Say that last part again.
10 California milk pooled?

11 Q If California milk were to be pooled in the
12 California State Order, it could not be diverted to a
13 non-pooled plant in the Pacific Northwest.

14 A Okay.

15 Q So, there is a --

16 A Are you asking me is that what this means?

17 Q That's -- I'm asking if you understand that
18 that was our intent, yes.

19 A Okay. Was it?

20 Q Yes.

21 A Yes, and that's what I understand.

22 Q All right.

23 A I'll agree with that.

24 Q Based on that clarified understanding then,
25 would you care to withdraw your statement that there's

1 no pooling standard or no performance standard
2 associated with Mr. McBride's proposal?

3 A Yes, that would be true. There's no -- that
4 is right. When I talked about there being no pooling
5 of performance standard, that would be true, but we
6 still think that the proposal that we made is a better
7 way to deal with the issue than this, that -- that
8 withstanding or not withstanding.

9 Q Okay. Let's take it a step at a time, and --

10 A Okay.

11 Q -- I'll promise you every opportunity to get
12 your points in.

13 A Okay.

14 Q But I think you misspoke in answer to my
15 question. So, let me ask it again.

16 A Okay.

17 Q Do you concede now that the proposal Mr.
18 McBride offered does indeed have pool performance as an
19 implicit part of its standard?

20 A Yes.

21 Q Okay. Now, let's get to what I think is your
22 position. Is it your view then that if other
23 performance standards are met, such as you propose,
24 it's okay for milk to be pooled, the same milk to be
25 pooled on both the state order in California or Montana

1 or Pennsylvania?

2 A Yes. We would have no objection if it met
3 the performance standard of the proposal that we made.

4 Q Okay. And then, it would have the effect of
5 drawing what we call in the industry as "double
6 pooling"?

7 A Yes, if it met those performance measures, it
8 could do that.

9 Q And what is the justification -- I understand
10 that's your position. What's the justification for
11 double pooling or as some people style it double
12 dipping?

13 A Historically, performance standards have been
14 the measure for the -- for qualifying in the pool, and
15 performance means how you deliver milk to the market in
16 question, the pool in question, and how you meet those
17 standards, and we would say that that -- that -- that
18 rule or that standard ought to continue.

19 Q Regardless of whether milk is also
20 simultaneously pooled?

21 A Yes.

22 Q In a state order?

23 A Yes.

24 Q Okay. So, let's go back through your
25 suggested -- well, through your identification of half-

1 a-dozen or so reasons why certain proposals may not be
2 -- may be unsatisfactory.

3 A Hm-hmm.

4 Q Do you feel that the McBride proposal --
5 let's just refer to it as that --

6 A Okay.

7 Q -- is arbitrary and not measurable with an
8 economic ruler?

9 A I don't see, you know, anything about does it
10 make economic sense for it to deliver or not. So, I
11 can't tell that there is one, and in the proposal that
12 we made, you have to unitize, if you will, as is stated
13 by a handler and then meet whatever standard that ends
14 up being the result of this hearing.

15 Q And we understand that under the prior
16 proposal, they would have to deliver as well. In fact,
17 they would have to deliver all their milk to a Pacific
18 Northwest plant or divert it in the circumstance where
19 it was not pooled in California.

20 A Okay.

21 Q Do you argue that the McBride proposal does
22 not address the universe of potential supply that can
23 attach itself to the market and never serve the market?

24 A I would say that that's -- I don't read any
25 of the various state orders. Based on the way you've

1 described, it would apply to any of them.

2 Q Can you suggest any unforeseen negative
3 consequences between milk pooled in the Pacific
4 Northwest Order, should the McBride proposal be
5 adopted, and, say, milk pooled under the State of
6 California Order or the State of Montana Order?

7 A I'm not intimately familiar with -- with
8 those -- those two. However, there are several of the
9 state orders, for example Pennsylvania, that the price
10 works in concert with the Federal Order price, and so
11 if you break that link, you may break that price
12 relationship, and so that could conceivably be an
13 unforeseen consequence.

14 Q Inasmuch as you're not familiar with the
15 California Order and the Montana Order, let me ask a
16 hypothetical question.

17 If it should turn out that there is no price
18 relationship established in either of those Orders
19 between what their Order charges and the Federal Order
20 pricing, would you then withdraw that concern from this
21 hearing record?

22 A Well, it seems like if there's any, you know,
23 opportunity as to how you distinguish, do you -- do you
24 then put in except for this Order and this Order and
25 this state order and this state order, how about one

1 that might be promulgate next year or -- or the
2 following; whereas, if you have the proposals that
3 we've suggested, you wouldn't run across those issues.

4 Your basic premise, if it doesn't conflict
5 with California, it must -- it would not be a problem
6 with California milk, you know, today, I would have to
7 agree with that. That may not be true, you know, with
8 some changes in the California Order or some of the
9 other Orders, some of the other state orders.

10 Q Well, how could there be a conflict if the
11 milk can't be pooled in both Orders?

12 A If there's some provisions that say that the
13 two pricing, you know, considerations work together to
14 provide a total price for the producer, that's the way
15 that those state orders have worked for awhile, perhaps
16 they would have to be changed in order to yield a blend
17 price to someone.

18 MR. MARSHALL: Your Honor, at this point, I'd
19 like to request that official notice be taken of the
20 regulatory structure in the two states of California
21 and Montana, so that Mr. Hollon may in brief explain to
22 the Secretary his concerns.

23 I will represent to you for purposes of this
24 ruling that the concerns Mr. Hollon has addressed as to
25 the present California and Montana Orders does not

1 exist, that neither of them is designed to complement
2 Federal Order pricing but instead to totally replace
3 it.

4 I do concede his point as to potential
5 changes in the future, but for purposes of making the
6 argument on brief, I ask that official notice be taken
7 of the published regulations of those two states.

8 JUDGE HUNT: California and what?

9 MR. MARSHALL: Montana.

10 JUDGE HUNT: Montana. Is there objections to
11 taking official notice of the -- the regulations
12 concerning milk for California and Montana?

13 MR. BESHORE: I think at a minimum, we need a
14 bit more specificity with respect to what we're taking
15 notice of.

16 MR. MARSHALL: Your Honor, while I'm asking
17 my loyal trusted supporters here to assist me, let me
18 add that I'm also advised that both states have the
19 regulatory structures available on the Internet to all
20 who may wish to find them there.

21 JUDGE HUNT: Maybe he means the pertinent
22 provisions.

23 MR. BESHORE: It probably does and that gives
24 me even more difficulty, and I would just note
25 parenthetically perhaps that this is one of the -- one

1 of the things that happens when we get into topics that
2 we didn't all expect to debate here.

3 MR. ENGLISH: Your Honor, as the principal
4 Proponent in two other Federal Order hearings regarding
5 the California Program and the fact that they have been
6 put into evidence at both of those other hearings, I
7 can tell you that at www.cdffa.gov, one can quickly
8 within the Dairy Programs go to the two programs that
9 are implemented by California, the Marketing and
10 Stabilization Plan and the Pooling Plans for Market
11 Milk, and within those sections, one can quickly find
12 from the regulatory provisions both historical analysis
13 of how those plans work.

14 While I've not been there recently, the
15 Montana plan, I do not have the cite for Montana, it
16 does work similarly, and it can be quickly accessed and
17 can tell you how the pricing pooling plan works for
18 Montana as well, and I would join in the request of Mr.
19 Marshall for taking official notice for these purposes.

20 JUDGE HUNT: We still haven't gotten to the
21 basic Exhibits 8, 9 and 10, but we're getting there.
22 So, first of all, it has to do with official notice of
23 the regulations concerning California, Montana, and I
24 will allow official notice to be taken of those
25 regulations and the website that Mr. English referred

1 to.

2 MR. MARSHALL: Thank you, Your Honor.

3 JUDGE HUNT: All right.

4 MR. MARSHALL: And I thank you, Mr. English.

5 BY MR. MARSHALL:

6 Q Now, resuming my questions about this
7 proposed Exhibit 10 and why it might be relevant to
8 this hearing, with respect to the Point Number 5, Mr.
9 Hollon, requiring that additional audit burden and
10 information might be required presumably from the State
11 of California may not be available, would you agree
12 with me that as Mr. McBride has proposed it, the
13 language would not require any audit of California
14 plant data nor any audit of payments from the
15 California State Pool because the only issue involved
16 is whether the milk is being diverted by somebody
17 within the Federal Order System who would have to
18 supply the diversion data from its own records?

19 A So, if I say I'm not doing it, that's good
20 enough?

21 Q That's good enough for me. Would you like to
22 comment on that?

23 A Might not be good enough for the Market
24 Administrator. They might say prove that you're not
25 doing it, thereby provide additional detail that may or

1 may not be available. I think in most cases, the audit
2 system is not a scout's honor program.

3 Q Mr. Hollon, you have some familiarity with
4 this matter of pooling in California, do you not?

5 A Yes.

6 Q And if you -- let's say hypothetically, Dairy
7 Farmers of America were to pool milk on the California
8 Order and also to pool it in a Federal Order, could not
9 the Federal Order Market Administrator have access
10 through you to any data as to receipt of funds from the
11 State of California?

12 A He may or may not, and I think the case in
13 point, though, is that there may not be a burden on the
14 California State Order to verify that.

15 Q Have you ever addressed -- this may be an
16 unfair question, and that's why I'm asking if you ever
17 addressed it -- a question of whether the Federal Order
18 Administrators in any of the Orders, but particularly
19 here in the West, would have authority to audit the
20 records of a plant receiving milk that is pooled under
21 one of the Federal Orders?

22 A I think they have that authority.

23 Q So, you're comfortable saying that they do
24 have that -- that ability to determine whether the
25 system has been gotten around in that fashion?

1 A I don't know if you would get to that answer,
2 but they can come in, you know, and show -- say show me
3 your books, but again whether or not that they go to
4 the California State Order and say, you know, justify
5 this receipt or trace this back, I don't know that
6 that's necessarily there or not.

7 In the case of where you're getting
8 something, you may be more inclined to be friendly
9 about it than when you're being denied something.

10 Q Would you agree with me then that, in
11 general, if a matter like this is auditable by the
12 Federal Market Administrator, it would increase the
13 likelihood that handlers like you and me would be
14 honest and forthright in --

15 A We're certainly among the greatest of the
16 honest and forthright, but it might not apply to
17 everybody.

18 Q But for those who might not be so honest and
19 forthright as you would be, would you agree that if
20 they were to mail a report in to the Market
21 Administrator, they would -- that was false in that
22 respect, that they'd be guilty of mail fraud?

23 A Yep. There could be some penalties involved.

24 Q And if they were to fax it in, it could be a
25 case of wire fraud?

1 A Okay.

2 Q I take it that's a yes?

3 A Yes.

4 Q Finally, enactment of -- you state here in
5 your Exhibit 10, "Enactment of performance-proposed
6 solutions would only migrate the problem to other Order
7 areas."

8 Could you kind of bring that down to the more
9 specific case that California milk pooled on Pacific
10 Northwest Order and what might migrate to what other
11 Order areas?

12 A The only thing, this raises the possibility
13 that if that -- if that milk is a problem in the
14 Pacific Northwest Order or in Order 30 or in Order 32,
15 and this type of proposal foreclosed it from Order 30
16 or Order 32 or the Pacific Northwest Order, that may
17 force it to another Order and that is just a
18 continuation of -- of the disorderly practice, that
19 again we think the solution that we propose is the
20 better choice and that it can be proposed systemwide
21 without as many consequences.

22 Q May I presume that in the -- are you aware, I
23 believe, that the Western Order has -- the Market
24 Administrator for the Western Order has -- I'm sorry.
25 The Secretary of Agriculture has asked with respect to

1 the Western Order for additional proposals that might
2 be heard up here, has it not?

3 A Yes.

4 Q And can I presume then from what you've just
5 said that Dairy Farmers of America has offered this
6 proposal to be heard in the Western Order?

7 A We understand that someone else has offered
8 that proposal.

9 JUDGE HUNT: Will you know if that was --

10 MR. MARSHALL: Exhibit 10.

11 JUDGE HUNT: -- Exhibit 10?

12 BY MR. MARSHALL:

13 Q Okay. So, your main concern would be in the
14 Arizona Order, somebody who was wanting to pool on
15 those Orders and was foreclosed from the opportunity to
16 pool California milk on Pacific Northwest or Western
17 might still have that opportunity as to what he wanted?

18 A Or any of the other Orders.

19 Q I'd like to represent to you, Mr. Hollon, my
20 willingness to join with you in asking for hearing on
21 131, and if anybody else in Order 131 would like to
22 have the same concepts, plural, concepts addressed in
23 the Federal Order Hearing, since one is going to be
24 held kind of in the area anyway, in Salt Lake City.

25 A Perhaps you can recruit Mr. Berde to --

1 Q Maybe we could.

2 A -- get that taken care of.

3 Q We could have both the hearings changed to
4 Phoenix possibly.

5 Well, Mr. Hollon, given the answers to my
6 questions, I'd ask you, what of your argument about the
7 inequity of -- let me rephrase my question.

8 Could you summarize what exactly your
9 solutions are regarding the pooling of California milk
10 if McBride's proposal is unsatisfactory, such that this
11 other solution that you propose ought to be considered
12 in this hearing?

13 A We've been in two other hearings, in addition
14 to this one, where we have made this proposal, and if
15 this issue is going to be addressed, we would prefer
16 that it be addressed under this manner and be addressed
17 similarly in all Orders.

18 Q All right. Thank you very much, Mr. Hollon.

19 MR. MARSHALL: Your Honor, for that narrow
20 purpose, I would see the -- I would have -- withdraw
21 any objections to the admissibility of Exhibit 10.

22 JUDGE HUNT: Any other comments on 8, 9 or
23 10?

24 (No response)

25 JUDGE HUNT: All right. At this time, I'll

1 admit Exhibits 8, 9 and 10 into the record.

2 (The documents referred to,
3 having been previously marked
4 for identification as Exhibit
5 Numbers 8, 9 and 10, were
6 received in evidence.)

7 JUDGE HUNT: Mr. Hollon is subject to
8 examination. Mr. English?

9 Let's take a break before we proceed to
10 examination.

11 (Whereupon, a recess was taken.)

12 MR. ENGLISH: Your Honor?

13 JUDGE HUNT: Would you please take your
14 seats?

15 MR. ENGLISH: Charles English, Your Honor. I
16 think there's been some discussion off the record, and
17 I'd like to go back to maybe a concept I floated before
18 lunch, which is that we now seem to have before us
19 issues that one side or the other are not entirely
20 prepared to deal with with respect to what I would call
21 the double dipping or double pooling or somebody can
22 call the pooling of California milk, and I think, and
23 I'll let my brethren speak for themselves, but I think
24 a logical conclusion would be to -- to -- to decide
25 that, at least on our parts, that we do have this

1 problem regarding both preparedness of people for the
2 issue and how it may or may not impact the Secretary on
3 Proposals 1 and 2, and knowing that maybe DFA has one
4 slightly different position, I guess what I would
5 propose, and I think people are going to back me up on
6 it, I'll find out quickly enough, is that rather than
7 spend any more time on this issue today, and knowing
8 that the Secretary cannot be bound, but nonetheless
9 recognizing that the requests are in for an emergency
10 hearing on the Western Order, that continued discussion
11 with respect to what might now be called Proposal 4,
12 and that is dealing with this milk from California or
13 Montana or whatever, be postponed, separated off from
14 the Secretary's decisionmaking on Proposals 1 through
15 3, and the parties will submit or whatever a request to
16 have that heard as a reopening of this hearing on the
17 non-expedited basis of this record with the Western
18 Order proceeding that we're requesting.

19 So, in a nutshell, not spend several more
20 hours on this issue today, which appears to be a
21 digression, and ask the Secretary to consider, both on
22 this record and otherwise, but to consider reopening
23 for the limited purpose of addressing this issue that
24 has now come up today.

25 MR. YALE: At the Western Order hearing, we

1 expect to be called some time in the near future.

2 JUDGE HUNT: Now, is that -- is that
3 agreeable to both those sides, all concerned? Mr.
4 Berde?

5 MR. BERDE: Yes, Your Honor. The Proponents
6 of Proposals 1 and 2 do not want any conflict,
7 controversy, question about the admissibility of this
8 proposal about double dipping to affect, impede or
9 delay decision, emergency decision that we have asked
10 for on Proposals 1 and 2.

11 Therefore, we would propose to the Secretary
12 that no consideration of the double dipping issue be
13 addressed on the record of this hearing, and that at
14 the appropriate time, when the Western Order hearing is
15 noticed, that it be combined with a hearing on this
16 single issue with respect to the Pacific Northwest
17 Order relating to the manner in which -- the
18 appropriate manner in which the concerns that have
19 already been addressed relating to double dipping be
20 addressed for this Order, whether on DFA's proposal or
21 on some alternate proposal, and I think I have the
22 concurrence of others who are present.

23 JUDGE HUNT: Now, I -- I was led to believe
24 that what was offered, what you call a double dipping,
25 was a modification concerning Proposals 1 and 2, and it

1 was essential for the Secretary to consider this double
2 dipping in order to make a decision on 1 and 2. That's
3 why I allowed it. It was a modification. It was
4 something for her to consider in deciding 1 and 2. In
5 other words, it was essential to it.

6 What I hear now is she can decide Proposals 1
7 and 2 without getting into this double dipping.

8 MR. BERDE: Correct. Because we've
9 apparently raised a --

10 JUDGE HUNT: It's not a modification then.

11 MR. BERDE: We don't -- we don't want it
12 considered at all at this juncture because we're
13 fearful that it might delay the decision, the emergency
14 decision on Proposals 1 and 2, and we will -- we will
15 address it in greater detail at the Western Order
16 hearing.

17 JUDGE HUNT: I appreciate that, but I --
18 also, this should not have been referred to as a
19 modification of 1 and 2 then, if it stands alone by
20 itself, and that's why I allowed it for that purpose.

21 MR. BERDE: I understand that. We would --

22 JUDGE HUNT: If you're in agreement on that,
23 then we can proceed, that what testimony has been
24 previously presented is to be disregarded, in effect,
25 as far as this so-called double dipping is concerned.

1 MR. BERDE: Right.

2 JUDGE HUNT: The Secretary can make a
3 decision based on strictly Proposals 1 and 2.

4 MR. BERDE: Strictly on Proposals 1 and 2.

5 JUDGE HUNT: As they stand now.

6 MR. BERDE: As they stand.

7 JUDGE HUNT: All right. Is there objections
8 to that? Are there objections to that?

9 MR. MARSHALL: Your Honor, just a
10 clarification, if I may. We've suggested a number --
11 both Mr. Van Dam and Mr. McBride have suggested a
12 number of technical modifications to Proposals 1 and 2,
13 in addition to what was proposed with respect to
14 California pooling or, rather, pooling on a state
15 order, such as California or Montana, and we would
16 certainly want those other proposed modifications to be
17 heard.

18 We're willing to withdraw the proposed
19 modification with respect to diversions of milk also
20 pooled on a state order for the time being, pending
21 either reopening of this hearing or some other -- do it
22 in some other fashion in conjunction with the Western
23 Order hearing.

24 I'd be happy to --

25 JUDGE HUNT: I already separated out these

1 so-called "technical changes" as opposed to the ones
2 that concern California pooling.

3 MR. MARSHALL: Right. The California issue
4 or, I should say, the state order issue being
5 controversial and the others apparently not so.

6 JUDGE HUNT: Mr. Beshore?

7 MR. BESHORE: We concur that the -- the
8 proposals with respect to the California pooling should
9 be on a separate track, a separate process from the
10 rest of the proposals in the hearing.

11 I want to make clear, however, that is
12 without prejudice to the position that DFA -- that we
13 haven't heard from DFA yet about with respect to the
14 emergency nature of the consideration of the issues and
15 the extent to which decisions on -- on this hearing
16 interlock with decisions on hearings yet to come.

17 JUDGE HUNT: Any more questions of Mr.
18 Hollon? Mr. Tosi?

19 CROSS EXAMINATION

20 BY MR. TOSI:

21 Q In light of all the discussion here about
22 California and double dipping, the proposal that you're
23 offering in Exhibit 10, setting up the state units and
24 the -- and the concepts embedded in there that have
25 been similar to what you've presented at other

1 hearings, --

2 A Yes.

3 Q -- should -- should the Department consider
4 this to be a proxy for the California issue or -- or is
5 this something completely separate?

6 A If we had known that that was going to be an
7 issue at this hearing, we would have made this proposal
8 and developed it to be in line with the other
9 proposals. If we receive a notice from the Secretary
10 that in conjunction with the Order 135 hearing, he or
11 she is open to that, we may -- we -- we may indeed
12 submit that.

13 If we get notice -- if we get no notice that
14 they're not reopening that hearing, then, you know,
15 there's no other avenue, but --

16 Q So, if we come out with a hearing notice that
17 reopens Pacific Northwest for the limited purpose of
18 double dipping, then --

19 A Yes.

20 Q -- what you say here in the -- in Exhibit 10,
21 we could not consider it on the basis of this
22 proceeding?

23 A Right.

24 Q Okay. I understand. Thank you very much.

25 JUDGE HUNT: Thank you. That's my

1 understanding, too.

2 MR. TOSI: Okay.

3 JUDGE HUNT: No more questions of Mr. Hollon?

4 MR. BERDE: I assume --

5 JUDGE HUNT: Yes, Mr. Berde?

6 MR. BERDE: I assume it will be noticed at
7 the appropriate time, when the Notice of Hearing is
8 issued on the Western Order. We will submit to the
9 Secretary a proposal to be included on -- in the
10 Northwest -- in the Pacific Northwest Order in that
11 hearing to consider strictly this issue.

12 MR. TOSI: You'll know it.

13 THE WITNESS: Does that mean that we have an
14 invitation to do that or do we need to wait till we get
15 one or what's --

16 MR. TOSI: You're free to submit proposals on
17 anything at any time.

18 THE WITNESS: Okay. All right. With regards
19 to that, I have one additional statement to make
20 regarding this proceeding and the future 135 proceeding
21 that has been noticed, is that DFA has a concern that
22 those two decisions be either released or effective at
23 approximately the same time, that we feel like we will
24 suffer financial harm or we could suffer financial harm
25 if, depending on what the Secretary finds, if there's a

1 lag and just like where we felt like the Order 30, 32
2 and 33 decisions should either be announced or made
3 effective on approximately the same date.

4 We think that the Order 135 and 124 decisions
5 with regard to Proposals 1 and 2 and whatever gets
6 noticed in 135 should also be announced at
7 approximately the same date, and we're not saying that
8 30, 32, 33, 135 and 124, all five have to be together.

9 We could -- we concede that those can proceed on two
10 different tracks.

11 JUDGE HUNT: Mr. Marshall, you have
12 questions?

13 MR. MARSHALL: Cross?

14 JUDGE HUNT: Cross.

15 CROSS EXAMINATION

16 BY MR. MARSHALL:

17 Q Mr. Hollon, with respect to your last
18 statement, could you explain what financial harm DFA
19 might potentially incur if the Pacific Northwest
20 decision is heard -- is issued before a Western Order
21 decision?

22 A I think I would prefer to do most of that at
23 the Western hearing, but suffice it to say that the
24 proposals that we would make at that hearing, you know,
25 may or may not be accepted, but if they were, and there

1 was some lag in the two decisions being announced, it's
2 conceivable we could suffer harm. That hearing has not
3 been noticed yet. So, it would be somewhat -- it would
4 be a little presumptuous of me to comment on, you know,
5 proposals or testimony or exhibits that would be put in
6 that case, but suffice to say that we feel like we
7 would have harm if they weren't made effective
8 together.

9 Q Well, let's explore that a bit. I think we
10 all understand, everyone in this room, that the DFA has
11 been pooling on the Pacific Northwest Order and would
12 therefore no longer be able to do so, at least in the
13 same fashion, once the Pacific Northwest Order decision
14 is reached.

15 A That's --

16 Q Correct?

17 A Depending on what that decision says, that
18 could be true.

19 Q Under what circumstances can there be a quid
20 pro quo that would provide you additional income in the
21 Western Order to offset that or in some way to balance
22 this financial loss?

23 A Are we in a negotiating mode now on the
24 record?

25 Q I'm trying to evaluate on the record the

1 merits of your claim that simultaneous announcements
2 would be helpful to DFA's financial position?

3 A Again, you know, absent the Notice of
4 Hearing, I think it's somewhat difficult to -- to put
5 those things into play, other than simply to say that
6 we feel like we will suffer financial harm if there's a
7 disparity in the time those decisions are announced.

8 Q Would you agree that -- that with every month
9 that goes by, non-DFA producers pooled under Pacific
10 Northwest Order will continue to suffer harm as a
11 result of such a delay because of the pooling that goes
12 on today?

13 A That may be true. Some of that depends on
14 the relationship of prices, but that could be true, and
15 I would say that every month that goes by, there will
16 be similar consequences in the Western Order should
17 some of the proposals that we make not be adopted.

18 Q Appreciate your candor there. Thank you.

19 JUDGE HUNT: Mr. Tosi?

20 CROSS EXAMINATION

21 BY MR. TOSI:

22 Q Just a couple questions. This is just in
23 case. These are just-in-case questions just in case a
24 decision is made by the Secretary not to reopen this in
25 a combined hearing with the Western Order.

1 Is DFA opposed to the double dipping of -- of
2 -- of the same milk on a Federal Order and on the state
3 order that has marketwide pooling?

4 A Our position has been and continues to be
5 that performance should drive all of those decisions,
6 and if the rules say you do A, B, C, to perform and
7 that's an economic benefit to you, then you will do
8 that, you know. That's the position we took in all of
9 the previous hearings and in this hearing. So, that
10 performance drives those decisions.

11 Q And is it still DFA's position that it
12 supports the notion of not being able to pool the same
13 milk on two Federal Orders at the same time?

14 A Yes, that would be true.

15 Q Could you offer your views as to the wisdom
16 of not being allowed by the Federal Order Program to
17 not permit the pooling of the same milk on more than
18 one Federal Order at a time?

19 A That -- that, I think, is a longstanding
20 tradition, and I think it's probably -- I'm not a part
21 of any of those records, but it seemed to make sense
22 that that wouldn't be the case. You shouldn't be on
23 two Federal Orders at one time, but we don't -- you
24 know, our position doesn't oppose that. That comes in
25 our performance issue that doesn't say that you could

1 not pool on two Federal Orders at one time under any
2 scenario.

3 But if you -- if you have milk in California,
4 and if the current state of rules say that you can do
5 this and it's performance-driven, then we're not
6 opposed to that.

7 Q If the Federal Order Program allowed pooling
8 of the same milk on more than one Federal Order at the
9 same time, what do you suppose one of the outcomes
10 might be if that happened?

11 A That would be a bad outcome.

12 Q In what way?

13 A Milk got pooled in the Central Order and the
14 Mideast Order at the same time, there would not be --
15 that would be disorderly. It would be a lot of schemes
16 set up to try to figure out how to do that. That would
17 not be good for the Federal Order System.

18 Q Would -- would it be disorderly in the sense
19 that we would end up with prices that are ununiform as
20 to handlers and producers?

21 A You could certainly end up with that
22 scenario.

23 MR. TOSI: That's all I have. Thank you.

24 JUDGE HUNT: Mr. Berde?

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CROSS EXAMINATION

BY MR. BERDE:

Q Elvin, you agreed in response to a question of Mr. Tosi that milk on the dairy farmer should not be pooled or permitted to participate in the Class 1 returns of a market unless it performs, is that correct?

A That's correct.

Q And would you agree that performance means that the milk of that dairy farmer does in fact service either on a daily, seasonal or reserve basis the Class 1 needs of that market?

A Whatever the rules are, that it meets those rules, yes.

Q And if it does not, it ought not to be considered a producer entitled to participate in the returns of that market?

A Yes, that's true.

Q And would you agree that the California milk that was paper pooled in the Upper Midwest Order would not meet that performance criteria that you have described?

A Well, at the time that it was and currently is, it does meet the criteria that's there. Our position was that the criteria needs to be more -- more

1 structured for milk that was a long distance away. So,
2 we provided a structure for that, and we think that's
3 the best structure that was offered.

4 Q Well, the California milk certainly did not
5 meet the reserve or ready reserve or current needs of
6 the Class 1 market of the Upper Midwest, did it?

7 A No. The current rules say you touch base
8 once for life and don't lose association, and you've
9 met the rules. So, --

10 Q I understand that that's what the rules say
11 and that's what gave rise to the need for amendment of
12 those rules, isn't that correct?

13 A But I don't think that to say that if you met
14 the rules, you know, that -- that -- that --

15 Q So, you would distinguish --

16 A -- is wrong.

17 Q -- between from rules and performance,
18 wouldn't you?

19 A We offered better rules.

20 Q And the better rules means performance, --

21 A Yes.

22 Q -- which in turn means supplying the Class 1
23 needs of the market?

24 A We offered better rules and that's -- that's
25 right. Supplying the needs of the market, but we

1 offered better rules, but those were the existing rules
2 in place at that time and now.

3 Q I understand that. Thank you.

4 JUDGE HUNT: Any others for Mr. Hollon?

5 (No response)

6 JUDGE HUNT: Thank you, sir.

7 (Whereupon, the witness was excused.)

8 JUDGE HUNT: Any other witnesses on the
9 proposals, for or against or comment?

10 (No response)

11 JUDGE HUNT: All right. Mr. Marshall?

12 MR. MARSHALL: Thank you, Your Honor. Just
13 for the record, I would like to join in the request
14 that Mr. Berde indicated earlier as to NMMF's position.

15 NDA joins in the request that a hearing be --
16 excuse me -- that a decision be issued on an emergency
17 basis with respect to Proposals 1 and 2 as have been
18 heard here today, and I would like to add the
19 additional thought that the device of a final decision,
20 such as has been used in other proceedings, might be
21 the best way to get that issue dealt with quickly while
22 the longer issue of California and Montana double
23 dipping is addressed.

24 JUDGE HUNT: Any other comments on the
25 expediting the decision? Mr. Beshore, you have

1 something? Is there anything else having to do with
2 Proposals 1 and 2? Yes, sir, Mr. Beshore?

3 MR. BESHORE: We may wish to call Mr.
4 Mykrantz back, but I'd need a few minutes to discuss
5 that possibility, just for one question or two.

6 JUDGE HUNT: All right. We can go off the
7 record while you discuss that with him.

8 (Discussion off the record.)

9 MR. BESHORE: Yes. We'd like to ask Mr.
10 Jonblonski from the Market Administrator's Office to
11 testify briefly on one very narrow and technical
12 subject area, and he has agreed to.

13 JUDGE HUNT: He has agreed to?

14 MR. BESHORE: Yes.

15 JUDGE HUNT: All right.

16 Whereupon,

17 GARY JONBLONSKI

18 having been first duly sworn, was called as a witness
19 herein and was examined and testified as follows:

20 JUDGE HUNT: All right. Please state and
21 spell your name, sir.

22 THE WITNESS: My name is Gary Jonblonski,
23 G-A-R-Y J-A-B-L-O-N-S-K-I.

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DIRECT EXAMINATION

BY MR. BESHORE:

Q By whom are you employed, Mr. Jonblonski?

A Federal Milk Market Administrator on the three Orders, 124, 135 and 131.

Q Okay. And what's your capacity there?

A Assistant Market Administrator.

Q Are you familiar with the interpretation and applicable of the pooling provisions of -- of Order 124?

A Yes.

Q Okay. Can you tell us -- there's a -- a -- a pooling technique that has been referred to in some contexts as pyramiding of pooling by which, under some Order language, organization -- pooling handlers have been able to use one unit of deliveries to distributing plants to qualify a multiple of units of deliveries, say five, if there's a 20-percent delivery requirement, to qualify five deliveries at a supply plant which in turn could qualify the same multiple of additional diversions to non-pooled plants. That's what I mean by pyramiding.

A Okay.

Q Okay. Is -- does Order 124 as interpreted allow for that type of pooling of milk?

1 A No, it doesn't. It has not been interpreted
2 to allow that to happen. The way it's been interpreted
3 is that milk that ends up at the pooled distributing
4 plant is the milk that we have allowed people to use as
5 a basis for their diversions.

6 If there's a hundred pounds goes to the
7 supply plant, 20 pounds goes to the pooled distributing
8 plant, we have a 20-percent requirement, 80 pounds gets
9 shipped out to perhaps a cheese plant, and then the
10 hundred pounds at the supply plant, like you said, they
11 could -- if the diversion limits were 80 percent, they
12 could divert another 400 pounds off of that hundred-
13 pound delivery to that pooled supply plant.

14 What we look at is the delivery that actually
15 goes to the pooled distributing plant from the supply
16 plant and that's the amount of milk that we allow them
17 to divert off. So, the deliveries of the cheese plant
18 are not part of what we count -- call a basis for
19 diversion.

20 Q Thank you.

21 MR. BESHORE: I have no other questions.

22 JUDGE HUNT: Any questions of Mr. Jonblonski?

23 (No response)

24 JUDGE HUNT: Thank you very much, sir.

25 (Whereupon, the witness was excused.)

1 JUDGE HUNT: Anything else on Proposals 1 and
2 2?

3 (No response)

4 JUDGE HUNT: All right. Mr. Cooper, you have
5 anything on 3?

6 MR. COOPER: Proposal Number 3 is the usual
7 Agricultural Marketing Service proposal. It puts
8 people on notice that other changes may be made in the
9 Order provisions performing in an incidental manner as
10 a result of the proposals that may be adopted herein,
11 and I don't believe any testimony is necessary.

12 JUDGE HUNT: Any comments on -- on 3?

13 (No response)

14 JUDGE HUNT: All right. Then on briefing
15 dates, how much time do you need to submit your briefs?
16 Any suggestions? Mr. Berde?

17 MR. BERDE: When is the record going to be
18 delivered?

19 JUDGE HUNT: It generally is two weeks turn-
20 around.

21 MR. COOPER: We asked for five days.

22 JUDGE HUNT: Five days.

23 MR. COOPER: But that doesn't mean we'll get
24 it.

25 MR. BERDE: It's difficult now to pick a date

1 for the submission of briefs without knowing for
2 certain when we will get the record, but assuming --

3 JUDGE HUNT: Just a second. Do you have any
4 idea when you might have the record? Will you be
5 preparing the record or will somebody else be
6 transcribing it? It should be ready by the end of next
7 week, I would think, but I'll have the hearing clerk
8 get on them.

9 MR. BERDE: Well, on behalf of the Proponents
10 who are asking for emergency action, we would --

11 JUDGE HUNT: Let's say the 14th. It should
12 -- that'd give them six days.

13 MR. BERDE: That is, we'd get the record?

14 JUDGE HUNT: To get the record. It has to be
15 sent out to you. You'd have to order it, yes.

16 MR. BERDE: Yes.

17 JUDGE HUNT: Pardon? Yes, Mr. Tosi?

18 MR. TOSI: Yes, Your Honor. This is the
19 fourth hearing that we've had now about pooling issues
20 and the Federal Order System, and what we've been doing
21 up until this hearing, and it seems to have worked out
22 quite well, is, is that when we get the hearing record
23 and -- and when we make that available, we're able to
24 put that up on the Internet, and previous decisions by
25 some of your colleagues have said, well, once it's

1 available on the Internet, so many days after that, --

2 JUDGE HUNT: Okay.

3 MR. TOSI: -- briefs would be due or
4 corrections to the record and then briefs, and then for
5 every day that they're -- that that record is delayed,
6 we could add a day --

7 JUDGE HUNT: All right. If that's been
8 working, then I see no reason to -- you're agreeable
9 with that system?

10 MR. TOSI: Then I guess the only thing to
11 decide is how much time after once the record's
12 available, --

13 JUDGE HUNT: Okay. All right.

14 MR. TOSI: -- do you want corrections and
15 then once the corrections are in.

16 JUDGE HUNT: All right. What's been the past
17 practice -- for the other two hearings, what's been the
18 time? What's the time table?

19 MR. TOSI: Two weeks for corrections once the
20 record's made available, and then --

21 JUDGE HUNT: After it's on the -- after it's
22 on the Internet, three weeks from that date?

23 MR. TOSI: That's correct.

24 JUDGE HUNT: Can you notify the parties when
25 it's available?

1 MR. TOSI: We haven't really been notifying
2 people. It just appears up on the Internet.

3 JUDGE HUNT: So, they've got to check, and as
4 soon as it appears, they've got two weeks.

5 MR. TOSI: We've been very good about as soon
6 as we get it, we verify that the electronic version is
7 the same as the paper version and put it up on the
8 Internet. Exhibits take a little bit longer because we
9 send them out to be scanned, --

10 JUDGE HUNT: Okay.

11 MR. TOSI: -- and then that usually takes
12 about three more days, but past decisions have been
13 it's from -- from the time that the hearing record
14 itself, the transcript of the proceeding, is -- is --
15 is put up on the Internet, two weeks from that date,
16 corrections would be due.

17 JUDGE HUNT: All right. Two weeks from the
18 time it's on the Internet for corrections.

19 MR. TOSI: And then whatever date that is,
20 three additional weeks for briefs.

21 JUDGE HUNT: Three weeks after the
22 corrections date?

23 MR. BERDE: Three weeks is -- three weeks is
24 okay with us.

25 JUDGE HUNT: All right. That's from time of

1 corrections. So, all together, that's five weeks then?

2 MR. TOSI: That's correct, Your Honor.

3 JUDGE HUNT: All right. Is -- is -- is
4 everyone in agreement on that protocol?

5 MR. BESHORE: We're in agreement. I think we
6 ought to set a tentative date, based on an assumption
7 of when the record's going to be --

8 JUDGE HUNT: How long does it take to scan
9 the transcript into the -- on the Internet, to get it
10 on, after you get it? Assuming it's available a week
11 from Friday, how long would it take?

12 MR. TOSI: Usually when we get the record, we
13 get a paper copy and a -- and an --

14 JUDGE HUNT: Oh, you just use the disk?
15 Okay.

16 MR. TOSI: We put the electronic copy usually
17 the same day up on the Net.

18 JUDGE HUNT: Well, let's see. Let's shoot
19 for the 17th as the date that it's on the Internet, Mr.
20 Beshore. So, then it would be January 1st, be January
21 2nd, I guess, would be the corrections.

22 MR. BESHORE: That will never work.

23 JUDGE HUNT: Okay. Well, we're here to --

24 MR. BESHORE: That's for corrections?

25 JUDGE HUNT: That's for corrections, and then

1 three weeks after that would be the 23rd for the brief.

2 MR. BERDE: January 23rd?

3 JUDGE HUNT: Yeah. That's tentative. If
4 there's a delay in getting it on the Internet, then, of
5 course, everything will slide by whatever days --

6 MR. TOSI: For example, Your Honor, if the
7 hearing record isn't put up on the Net, say for
8 example, until December 19th, then corrections would be
9 due --

10 JUDGE HUNT: Two days after that.

11 MR. TOSI: -- the 4th of January.

12 JUDGE HUNT: January.

13 MR. TOSI: And then the 25th of January,
14 briefs would be due, for example.

15 JUDGE HUNT: All right. Everyone understand
16 that? We're going -- the starting date will -- we'll
17 assume it's the 17th.

18 MR. BERDE: Briefs are due between January
19 23rd and the 30th is what it comes out to, but then the
20 target date is January 23rd?

21 JUDGE HUNT: That's right.

22 MR. BERDE: Okay. And that is upon the
23 assumption that the schedule that Mr. Tosi just
24 described is in fact complied with?

25 JUDGE HUNT: Yes. Assuming the 17th is the

1 starting date.

2 MR. BERDE: Yeah.

3 JUDGE HUNT: That's when it's on the
4 Internet.

5 MR. BERDE: Assuming available.

6 JUDGE HUNT: Now, that has -- now, that
7 hasn't been confirmed yet. I haven't confirmed that,
8 but now, that's what we're -- we're shooting for.

9 MR. BERDE: Yeah.

10 JUDGE HUNT: Does anyone object to that?

11 MR. COOPER: By --

12 JUDGE HUNT: Mr. Cooper?

13 MR. COOPER: By the record on the Internet, I
14 think we're talking about the transcript.

15 JUDGE HUNT: The transcripts.

16 MR. COOPER: The exhibits go on a few days
17 later because they have to go out, but I don't think we
18 have to delay the exhibits because I've got all of them
19 in my hand.

20 JUDGE HUNT: Okay.

21 MR. COOPER: It's not going to take very long
22 to do that.

23 JUDGE HUNT: I haven't heard anybody else
24 make any comment about delay because of exhibits.

25 All right. Is there anything else?

1 (No response)

2 JUDGE HUNT: All right. Then if there's
3 nothing further, then we'll close the hearing.

4 Thank you very much.

5 (Whereupon, at 3:52 p.m., the hearing was
6 concluded.)

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